88-1657

Supreme Court, U.S.
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NO.

IN THE

Supreme Court of the United States

October Term, 1988

S.H. and P.F., et. al.,

Petitioners,

vs.

JOE EDWARDS, et. al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the court erred in ignoring the independent professional judgments of the plaintiffs' treating professionals, required by Youngberg v. Romeo, 457 U.S. 307 (1982) and Parham v. J.R., 442 U.S. 584 (1979), for constitutionally acceptable involuntary institutionalization, and accepting four generalized affidavits prepared for the court that ignore the specific needs of hundreds of mentally retarded individuals and declare only in sweeping terms that a type of treatment is acceptable for an entire class of persons, and therefor granting summary judgment for the defendants.

A. Whether the court erred in reaching a constitutional issue not presented by the plaintiffs' complaint, thereby eviscerating the Youngberg standard.

II. Whether the court erred in failing to find that institutionalization contrary to the criteria specified in Georgia law infringes a state-created liberty interest and is therefore unconstitutional.

PARTIES TO THE PROCEEDINGS BELOW

Plaintiffs-Appellants

S.H. and P.F., individually and on behalf of all others similarly situated

Defendants-Appellees

JOE EDWARDS, former Commissioner of the Georgia Department of Human Resources; JAMES LEDBETTER, successor in office to JOE EDWARDS; R. DERRIL GAY, former Director of the Division of Mental Health, Mental Retardation, and Substance Abuse; JOHN GATES, successor in office to R. DERRIL GAY

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No.
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**S.H. and P.F.,
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PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

Petitioners, S.H. and P.F., et al., on behalf of themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Eleventh Circuit entered in this action on November 28, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit is found at S.H. and P.F. et al. v. Edwards, 860 F.2d 1045 (1988). The decision denying rehearing and rehearing in banc, rendered on January 9, 1989, is reported at 866 F.2d 1420. The opinion of the district court is not reported but is set out in an appendix to the opinion of the Eleventh Circuit at 860 F.2d 1046.

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on November 28, 1988, and the decision denying rehearing and rehearing in banc was rendered on January 9, 1989. This Petition for a Writ of Certiorari is filed within ninety days of the Court of Appeals' denial of the suggestion for rehearing in

banc. The jurisdiction of this Honorable Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the Government for a redress of grievances.

United States Constitution, Amendment 14:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

FEDERAL RULE OF CIVIL PROCEDURE INVOLVED

FED. R. CIV. P. 56. Summary Judgment; (a), (b), (e):

> (a) For Claimant. A party seeking to recover upon a claim, counterclaim, or cross-claim or to obtain a declaratory judgment may, at any time after the

expiration of 20 days from the commencement of the action or after service of a motion for summary judgment by the adverse party, move with or without supporting affidavits for a summary judgment in the party's favor upon all or any part thereof.

(b) For Defending Party. A party against whom a claim, counterclaim, or cross-claim is asserted or a declaratory judgment is sought may, at any time, move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

* * *

(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing

that there is a genuine issue for trial. If the adverse party does not so respond, summary judgment, if appropriate, shall be entered against the adverse party.

GEORGIA STATUTES INVOLVED

O.C.G.A. § 37-2-1 (in pertinent part):

> (a) The State of Georgia recognizes its responsibility for its citizens who are mentally ill or mentally retarded...and recognizes an obligation to such citizens to meet their needs through a coordinated system of community facilities, programs, and services.
>
> * * *
>
> (c) It is the purpose of this chapter to enable and encourage the Department of Human Resources and the county boards of health to develop comprehensive, preventive, early detection, rehabilitative, and treatment services; to improve and expand community programs for the disabled; ... and to restructure the system of providing mental health and mental retardation services in the State of Georgia to make better use of the combined resources of the state and local communities and to remove the financial limitations of the counties as a major obstacle in the development of effective community mental health and mental retardation programs.

O.C.G.A. § 37-4-40(f) (in pertinent part):

> If the court finds that the client is

mentally retarded and is in need of such additional services, the department shall recommend a habilitative program for the client, based upon the individualized program plans submitted, which is an alternative to care in a facility. If the court finds that such an alternative program is available and that such program presents a reasonable expectation of accomplishing the stated goals of the individualized program plan adopted by the court, the court shall order the client to comply with the plan and shall issue appropriate orders to implement the plan. If the court concludes from the evidence that the least restrictive available alternative which would accomplish the goals of the plan is for the client to be admitted to a facility, the court shall not order such admission unless it further specifically finds that:

(1) the client requires direct medical services;

(2) the client needs 24 hour training in a residential care facility; and

(3) the Court has been notified by the department that a bed appropriate to the specific needs of the client is available and that the services indicated in the individualized program plan submitted to the court by the comprehensive evaluation team or by the client can be provided.

O.C.G.A. § 37-4-121:

It is the policy of the state that the least restrictive alternative placement be secured for every client at every stage of his habilitation. It shall be the duty of the facility to assist the client in securing placement in noninstitutional community facilities and programs.

O.C.G.A. § 37-4-122(a):

(a) Each client in a facility and each person receiving services for mental retardation shall receive habilitation that is suited to his needs and is the least restrictive appropriate habilitation. Such habilitation shall be administered skillfully, safely, and humanely with full respect for his dignity and personal integrity.

O.C.G.A. § 37-5-2:

Since the State of Georgia accepts a responsibility for its mentally retarded citizens and an obligation to them which it must discharge, facilities, programs, and services shall be made available to meet the needs of each mentally retarded person during his entire lifetime. The primary purpose of this chapter shall be to provide community-based alternatives to total institutional care so that mentally retarded individuals can continue to live in their home communities.

O.C.G.A. § 37-5-3:

As used in this chapter, the term:

(1) "Community services" means all community-based services deemed reasonably necessary by the department to provide for education, training, rehabilitation, and care of mentally retarded individuals and shall include but not be limited to: diagnostic and evaluation services; day-care and training services; work-activity services; community residential services such as group family-care homes; transportation services incidental to educational, training, and rehabilitation services; social services; medical services; and specified home services.

O.C.G.A. § 37-5-4:

(a) This chapter shall apply to all county boards of health in Georgia and to the Department of Human Resources.

(b) Mentally retarded individuals who are not eligible to receive community services from other public agencies and mentally retarded individuals who are not in fact receiving such services shall be entitled to receive all services afforded under this chapter.

O.C.G.A. § 37-5-10:

The department shall employ sufficient professional and nonprofessional persons to assure full implementation of this chapter by June 30, 1978. All community services specified in paragraph (1) of Code Section 37-5-3 shall be made available for all mentally retarded individuals by June 30, 1978.

STATEMENT OF THE CASE

This action was brought in May 1981 under 42 U.S.C. § 1983 as a due process and equal protection challenge by a class of institutionalized mentally retarded individuals in Georgia to the defendants' failure to provide them with statutorily-mandated periodic reviews and hearings regarding their need for continued institutionalizaotion. Additionally, the class members challenged the defendants' failure to abide by the recommendations of the plaintiffs' treating professionals that they needed community services, not institutionalization. They asserted a substantive due process right and state law[1/] rights to treatment in accordance with individualized professional judgment. The class members are all individuals who were institutional-

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1/ These claims were dismissed following Pennhurst State School and Hospital v. Halderman, 465 U.S. 89 (1984).

ized prior to 1978, and who never had any judicial or other formal determination of their need for continued hospitalization prior to this litigation. The defendants are the Commissioner of the Georgia Department of Human Resources (DHR), and the Director of the Division of Mental Health, Mental Retardation, and Substance Abuse, a division of DHR. Jurisdiction was asserted under 28 U.S.C. § 1343(a)(3) and (a)(4); 28 U.S.C. § 1331; and the court's then-existing pendent jurisdiction over state law claims.

The issues came before the district court on the plaintiffs' motion for summary judgment on the procedural and state law claims, and the defendants' motion for summary judgment on the entire complaint. 860 F.2d at 1047. The district court found that hundreds of the class had been deter-

mined by their treatment teams[2/] to be inappropriately institutionalized and in need of immediate community placement. The court also found that the defendants had failed to provide community placements and services to those whose treating professionals had recommended such placements. The evidence also showed that those community placements would be less costly than institutionalization, yet the defendants had allowed substantial sums of money earmarked for community services to go unspent.

Some nineteen months after the filing of cross-motions for summary judgment, the submission of all supporting materials, and oral argument of the motions before the magistrate, the defendants submitted to the

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2/ These individuals are professionals in various relevant disciplines employed by the defendants at the state institutions where plaintiffs are confined.

district court four affidavits from administrators and supervisors who opined generally that the treatment provided in certain of the facilities at issue was within the range of generally accepted professional treatment for the mentally retarded. None of the affiants had personally examined any of the plaintiffs. Plaintiffs objected to the affidavits on the grounds that they were immaterial, untimely, vague, and submitted without any opportunity for the plaintiffs to depose or otherwise cross-examine the affiants, as discovery had closed at the time of the submission of the affidavits.

The district court granted the plaintiffs' motion for summary judgment on the claim regarding reviews and hearings on equal protection and procedural due process grounds. The district court granted the defendants' motion for summary judgment on

the treatment claims, having construed the plaintiffs' claim as one seeking to enforce a constitutional right to treatment in the least restrictive environment, rather than what it was -- a claim of entitlement to be treated in accordance with individualized professional judgment.

The defendants did not appeal the procedural claim, but the plaintiffs appealed the district court's decision regarding their treatment rights. On November 28, 1988, a panel of the Court of Appeals for the Eleventh Circuit, in a 2-1 decision, affirmed the grant of summary judgment to the defendants. Judge Clark, in a vigorous dissent, argued that the majority decision contravened settled law in the Eleventh Circuit, was inconsistent with principles enunciated in relevant Supreme Court decisions, and improperly affirmed a summary judgment where substan-

tial factual issues were in dispute. On January 9, 1989, the Eleventh Circuit Court of Appeals denied rehearing and rehearing in banc.

REASONS FOR GRANTING THE PETITION FOR A WRIT OF CERTIORARI

I. **THE COURT ERRED IN IGNORING THE INDEPENDENT PROFESSIONAL JUDGMENTS RENDERED BY THE PLAINTIFFS' TREATING PROFESSIONALS, AND ACCEPTING FOUR GENERALIZED OPINIONS PREPARED FOR THE COURT, AND OFFERED BY THE DEFENDANTS, THAT IGNORED THE SPECIFIC NEEDS OF INDIVIDUALS AND DECLARED ONLY IN SWEEPING TERMS THAT A TYPE OF TREATMENT IS ACCEPTABLE FOR AN ENTIRE CLASS OF PERSONS NEEDING HABILITATION, TO SUPPORT THE GRANT OF SUMMARY JUDGMENT FOR THE DEFENDANTS.**

The error of the lower courts arose because of their misunderstanding of the issue presented in this case. Both courts viewed this case as one seeking to establish a general constitutionally-based right to treatment in the least restrictive environment. Plaintiffs sought, rather, simply to enforce their right to treatment in accordance with individualized profes-

sional judgment under Youngberg v. Romeo, 457 U.S. 307 (1982) and to discharge when professionally mandated. As Judge Clark correctly put it in his dissent below: "The issue is: May an agency of the State of Georgia constitutionally confine a mentally retarded person in a ward in an institution contrary to that person's professional advisor's recommendation?" 860 F.2d at 1053. The issue the courts should have decided was whether individualized professional judgment had been exercized with regard to the "treatment", i.e., continued institutionalization, being provided to the plaintiffs. Nonetheless, "the district court viewed the case too simplistically and cut off plaintiffs' claims prematurely." 860 F.2d at 1061 (Judge Clark, dissenting). Thus, not only did the court decide an issue which was not presented by this case, it erroneously summarily decided

a question which is inherently a factual question. In mischaracterizing the issue, both lower courts misapplied this Court's precedents and thereby totally eviscerated the standards established in Youngberg and Parham v. J.R., 442 U.S. 584 (1979). Very recently, this Court has observed that while a State may, as a general rule, owe no duty to provide services to its residents, such a duty does arise in certain circumstances. When a state incarcerates or institutionalizes a person, the Constitution imposes a duty to assume some responsibility for the person's safety and general well-being. DeShaney v. Winnebago County Department of Social Services, ___ U.S. ___, 109 S.Ct. 998 (1989). The Court noted "... the protections of the Due Process Clause, both substantive and procedural, may be triggered when the State, by affirmative acts of its agents, subjects an

involuntarily confined individual to deprivations of liberty which are not among those generally authorized by his confinement." 109 S.Ct. at 1006 n.8.

The plaintiffs did not move for summary judgment on the claim regarding their rights to treatment in accordance with individualized professional judgment because they viewed the question as inherently a factual one, requiring a trial. The defendants, on the other hand, moved for summary judgment "on the entire complaint", 860 F.2d at 1047, and briefed the issue in both lower courts as a "least restrictive environment" issue. The plaintiffs steadfastly pointed out that their claim was entirely different and did not seek to establish such a right, which had been rejected by some circuits.

In this case, the grant of summary judgment prevented the plaintiffs from

establishing that they are being deprived of their liberty unconstitutionally in that continued institutionalization is inconsistent with their needs for habilitation and in some cases is actually injuring them. The defendants themselves conceded that institutionalization is injurious; documents obtained from them and submitted by the plaintiffs to the court reflect the defendants' view that persons "do not develop fully or properly in an atypical environment such as an institution. Before people can have any understanding of what is socially acceptable and desirable, they must have the experience of taking responsibility for themselves in their physical and social environments. People not given the opportunity for such experiences often have difficulty participating in society." See, "Community Residential Services for Individuals Who are Mentally Retarded:

Some Commonly Asked Questions (1982)", prepared by the Georgia Department of Human Resources, and submitted below as Exhibit 33, with Plaintiffs' Motion for Summary Judgment.

Moreover, as Justice Brennan pointed out in his dissent in DeShaney, the institutionalization of the plaintiffs "render[s] these people helpless to help themselves or to seek help from persons unconnected to the government." 109 S.Ct. at 1008. Cf., Clark v. Cohen, 794 F.2d 79, 96 (3rd Cir. 1986) (Becker, J., concurring), cert. denied, 479 U.S. 962 (1986). Under Georgia law, if the plaintiffs attempt to leave their institutions, law enforcement officials are authorized to apprehend them and return them to the facility. O.C.G.A. § 37-4-7. Thus, the state would interfere in any attempt by the plaintiffs to seek help elsewhere.

Recognizing that Youngberg played a part in the consideration of the plaintiffs' claim, the defendants argued that continued institutionalization of anyone and everyone in the class was consistent with professional judgment. The defendants belatedly submitted four brief affidavits, prepared specifically to support the defendants' long-pending motion. The affidavits were, in pertinent part, similarly worded, and asserted generally that "'the care, training, treatment and habilitation received by residents at the Georgia Retardation Center in Atlanta falls within the range or [sic] acceptable professional judgment...'" 860 F.2d at 1053 (Clark, J., dissenting, citing Record, Vol. III, Tab 53 at Exhibit D).

The plaintiffs, however, never challenged the nature of the care and treatment generally provided by the Georgia institu-

tions. Their claim questioned whether their confinement in those institutions was constitutionally appropriate in light of the judgment of their treating professionals that their needs were not being met in those institutions, and that in fact some of them were regressing.[3/] None of the affidavits spoke to this issue -- none alleged any specific information regarding individuals who had been recommended for discharge, and the defendants offered no evidence as to whether continued institutionalization in that context was professionally acceptable. The evidence regarding the exercise of professional judgment with respect to individual needs was offered by the plaintiffs, and it directly

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3/ The existence of the custodial relationship between the State and the plaintiffs places a special duty on the State not to harm the plaintiffs. Taylor v. Ledbetter, 818 F.2d 791, 797-798 (11th Cir. 1987) (in banc), cert. denied, ___ U.S. ___, 109 S.Ct. 1337 (1989).

contradicted the defendants' evidence.

Notwithstanding the conflicting evidence, the district court granted, and the Eleventh Circuit affirmed, summary judgment to the defendants, condoning the continued institutionalization of the plaintiffs.[4/] The entry of summary judgment for defendants on the treatment claim was erroneous for several reasons. First, the conflict in evidence itself should have

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[4/] The plaintiffs' success on the procedural issues may be, therefore, a pyrrhic one, for if the defendants are not constitutionally required to follow the professional recommendation of an individual's treatment team, the appropriateness of continued habilitation in an institution, which is the issue at the hearing, need not be remedied, despite an order for discharge. Cf., Clark v. Cohen, 794 F.2d 79, 86 (3rd Cir. 1986) ("The hearing required by the Due Process Clause is not a moot court exercise. The hearing tribunal must have the authority to afford relief", citing Parham, 442 U.S. at 607), cert. denied, 479 U.S. 962 (1986). See also, S.H. v. Edwards, 860 F.2d at 1055 (Clark, J. dissenting) ("...habilitation reviews serve no purpose."), and n. 7, infra, and text.

precluded entry of summary judgment. Further, the irrelevance of the defendants' evidence to the issue before the court, as well as the timing and nature of the affidavits, should have precluded summary judgment. Finally, the approach adopted by the Eleventh Circuit ignores the relationship between Youngberg and Jackson v. Indiana, 406 U.S. 715 (1972) and the proper method and standards for deciding liberty claims such as those raised by the plaintiffs. In Youngberg, this Court held that damage liability for treatment decisions for an institutionalized mentally retarded young man could not be imposed so long as the treatment decisions were made by an appropriate professional and were not such a "substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the persons responsible actually did not base the decisions

on such a judgment." 457 U.S. at 323. The Court noted that testimony of the plaintiff's experts would be relevant to whether the treatment decisions actually made were such a departure.

A. The conflict in the evidence should have precluded summary judgment.

To prevail on a motion for summary judgment, the defendant-movant must bear the burden of production of evidence on an issue which will defeat the plaintiff's claim. Celotex Corporation v. Catrett, 477 U.S. 317 (1986). The non-movant must then either discredit that evidence or point to other evidence in the record which creates a genuine issue of material fact. "...[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth of the matter but to determine whether there is a genuine issue for trial." Anderson v. Liberty

Lobby, 477 U.S. 242, 249 (1986).

In this case, assuming arguendo the relevance of the defendants' evidence,[5/] the existence of both that evidence and the plaintiffs' evidence of the treatment team recommendations at the very least created a genuine issue of material fact regarding the appropriateness of the habilitation and treatment being provided to the plaintiffs, precluding the entry of summary judgment for either party. Youngberg specifically held that the testimony of Romeo's expert witnesses regarding alternative treatments was relevant "to whether petitioners' decisions were a substantial departure from the requisite professional judgment." 457 U.S. at 323 n. 31. For purposes of summary judgment, the court was required to -- and in fact did -- credit the plaintiffs' evi-

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[5/] See however, pp. 28-40, infra.

dence as to the inappropriateness of their treatment, and since there was a dispute on that issue, a trial should have ensued. Youngberg v. Romeo, 457 U.S. 307, 321-324 (1982). See also, Anderson v. Liberty Lobby, 477 U.S. 242, 255, (1986) ("Credibility determinations, the weighing of evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge.... The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor.") Both lower courts, however, took on that jury function and found that institutionalization is appropriate treatment notwithstanding the evidence of contrary individualized professional recommendations. This result, affirming the summary judgment granted to the defendants, renders the Youngberg test meaningless.

Where experts disagree, the court has no choice but to conduct an independent inquiry into the effectiveness, cost, and reasonableness of proposed treatment. The judgment of the state's professionals is not necessarily conclusive. Woe v. Cuomo, 729 F.2d 96, 106 (2d Cir. 1984) (reversing summary judgment), cert. denied, 469 U.S. 936 (1985); "The Supreme Court, 1981 Term", 96 HARV. L. REV. 62, 85 (1982). Given the conflict in the evidence regarding the appropriateness of the treatment being provided to the plaintiffs, summary judgment should not have been entered for the defendants. Cf., Wells v. Franzen, 777 F.2d 1258 (7th Cir. 1985), where the court held that whether the decision to restrain a prisoner due to alleged suicidal inclinations was made by a professional and implemented in a medically justifiable manner is a factual question, reversing summary judg-

ment to the defendants.

B. The defendants' affidavits were irrelevant to the issue before the court and do not support the summary judgment granted to the defendants.

As argued above, given their most favorable interpretation, the defendants' affidavits should have led to a trial of the factual issues surrounding treatment. On the other hand, as the plaintiffs argued in the courts below, those affidavits were on their face irrelevant. In DeShaney, for instance, Justice Brennan, in dissent, discussing Youngberg's deference to professional judgment, pointed out that, "once a caseworker has decided, on the basis of her professional training and experience, that one course of protection is preferable for a given child," liability for harm could not attach. 109 S.Ct. at 1012 (emphasis supplied). By contrast, an opinion that a course of conduct is appropriate for an entire class of children, or, as here, an

entire class of mentally retarded individuals, would not justify judicial deference to that opinion.

Several decisions in other circuits demonstrate why the defendants' affidavits were irrelevant. Prior to the instant case, five circuit courts had invoked Youngberg in the context of institutionalization of the mentally retarded. Three of those conflict with the decision in the instant case, and the other two are distinguishable.

The Second, Third, and Fourth Circuits have each held that an individual is entitled to treatment in accordance with the recommendations for him by his treating professionals. Clark v. Cohen, 794 F.2d 79 (3rd Cir. 1986), cert. denied, 479 U.S. 962 (1986); Thomas S. v. Morrow, 601 F. Supp. 1055 (W.D.N.C. 1984), affirmed, 781 F.2d 367 (4th Cir. 1986), cert. denied, 476 U.S.

1124 (1986); Society for Good Will To Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984); Woe v. Cuomo, 729 F.2d 96 (2d Cir. 1984), cert. denied, 469 U.S. 936 (1985).[6] See also, Wyatt v. Aderholt, 503 F.2d 1305, 1309 (5th Cir. 1974). Notably for the case at bar, the Second Circuit stressed that the "professional judgment" which is critical to upholding continued institutionalization is that which is rendered at the time the challenged decision is made. Society for Good Will, 737 F.2d at 1248. In this case, that was the decision not to provide community placements and

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[6] The lower courts' reliance on Society for Good Will illustrates their misunderstanding of the issue presented by the case at bar. In Society for Good Will, the Second Circuit held that there was no constitutional right to treatment in the least restrictive environment, but the court did indicate that the plaintiffs in that case had a constitutional right to treatment which addressed their individual needs. This is the issue in this case.

services to the plaintiffs once their treating professionals had recommended such placements. Under Society for Good Will, the affidavits submitted by the defendants were irrelevant as they did not address that decision or the circumstances which existed at that point in time. 737 F.2d at 1248-1249. The critical decision is that made at the time the treatment plan is being devised, or the particular treatment decision is being made. This is consistent with Youngberg.

Furthermore, in Society for Good Will the court found that "constitutionally adequate training was not being provided to SDC residents", because "[w]hile there may have been programs designed to deal with such [inappropriate] behavior...these programs could rationally be found to have been inadequate in quantity or quality, or unspecific and not geared toward individual

clients' needs." 737 F.2d at 1251 (emphasis supplied). The court thus explicitly rejected the approach taken by the Eleventh Circuit, under which the existence of the programs alone, regardless of their individual applicability, would suffice to uphold the constitutionality of the treatment.

The two other circuit cases which apply Youngberg are distinguishable. In Lelsz v. Kavanagh, 807 F.2d 1243, 1249-1251 (5th Cir. 1987), the court held that Youngberg did not create a generalized right to community placement. The petitioners in the case at bar did not assert a generalized right to community placement. Significantly, the district court in Lelsz subsequently ruled that the plaintiffs were constitutionally entitled to individualized treatment based on "what is appropriate, not upon what resources are available ...When professionally acceptable judg-

ments are not effectuated because of administrative ineptitude or insufficient funds, the inadequacy of care is not removed from judicial purview simply because the initial judgments made by professionals were proper." 673 F. Supp. 828, 835 (N.D. Tex. 1987). Under the Eleventh Circuit's application of Youngberg, however, the inadequacy of care, alleged to have resulted from "administrative ineptitude or insufficient funds", is removed from judicial purview and constitutional scrutiny, based solely on generalized affidavits that utterly disregard and undeniably conflict with the professionally acceptable judgments made by the plaintiffs' treating professionals in the context of treatment.

In Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983), the court invoked Youngberg to find that the plaintiffs had no generalized right to treatment in a commu-

nity setting, but in that case there was no claim that the judgment of treating professionals had not been followed. The reliance of the lower courts on Phillips was therefore misplaced and once again illustrates the courts' misunderstanding of the real issue in this case.

The Eleventh Circuit Court of Appeals stated:

> The experts in this case agree that Georgia's decision to keep these plaintiffs in institutional settings until community facilities can be made available does not deviate from professionally accepted standards.

860 F.2d at 1046. Even if this were true -- and the plaintiffs do not read the record to establish this, nor do the challenged affidavits make such assertions -- this is not the constitutionally relevant inquiry. This conclusion, as a statement of the plaintiffs' constitutional right to liberty and appropriate treatment, flies in the

face of Youngberg, Jackson v. Indiana, 406 U.S. 715 (1972), and Parham v. J.R., 442 U.S. 584 (1979).

This observation, moreover, demonstrates the inappropriateness of evaluating professional judgments on a motion for summary judgment. The court does not clarify which "experts" it relies on, nor which "professionally accepted standards" govern the decision, nor any indication as to whether the state's failure to provide community facilities would ever amount to a constitutional deprivation.

Several judgments were made here: (1) the judgment of the treatment teams that institutionalization of the plaintiffs was not necessary; (2) the judgment of state policymakers not to develop community living alternatives for the plaintiffs; (3) the judgment of the defendants' affiants that institutionalization is generally

within professionally accepted standard treatment for the retarded as a group.

Caselaw instructs, however, that only the first judgment described above is constitutionally relevant to the protection of the liberty interests of the institutionalized individual.[7/] Courts have specifically repudiated reliance on the second as a justification for continued infringement of that interest. Thomas S. v. Morrow, 601 F. Supp. 1055, 1060 (W.D.N.C. 1984), ("To the extent that a professional's judgment of the appropriate treatment is shown to have been modified to fit what is available, that judgment likely has become 'a substantial departure from accepted professional

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7/ Cf., Parham, 442 U.S. at 605, 613, emphasizing the ability of a treating professional to effectuate discharge when treatment is no longer necessary. In the instant case, the judgments of treating professionals that institutionalization was no longer necessary for the plaintiffs have not been effectuated.

judgment, practice or standards'", quoting Youngberg), affirmed, 781 F.2d 367 (4th Cir. 1986), cert. denied, 476 U.S. 1124 (1986); Lelsz v. Kavanagh, 673 F. Supp. 828, 835 (N.D.Tex. 1987).[8/] See also, Ohlinger v. Watson, 652 F.2d 775, 779 (9th Cir. 1981) ("Lack of funds, staff or facilities cannot justify the State's failure to provide appellants with that treatment necessary for rehabilitation."); Wyatt v. Aderholt, 503 F.2d 1305, 1315 (5th Cir. 1974). Although treatment decisions compelled by lack of financial resources may preclude damage liability, Youngberg, 457 U.S. at 323, they are not thereby necessarily insulated from injunctive relief. Scott v. Plante, 691 F.2d 634, 638 (3rd Cir. 1982) (discussing Youngberg).

[8/] Thus, one of the issues at a trial in this case would be whether the defendants' experts had based their opinions on available resources rather than appropriate resources.

Moreover, commentators have cautioned against deference to the third judgment, making generalized conclusions about appropriate treatment for entire groups, since it is most likely to be based on non-clinical factors. Symposium: The Future Direction of Disability Law: New Approaches and Forums, 20 LOYOLA OF L.A. L.REV. (June 1987) 1551 n.10. ("Since decisions which result in institutionalization of a group are more likely to be based upon non-clinical factors, they should be especially vulnerable to attack.") (emphasis in original).[9/]

In short, the defendants' affidavits were irrelevant to the issue raised by the

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9/ That author also cautions that "...a mental health professional's involuntary hospitalization of a person because 'the hospital was the only placement available', or the state administrator's decision to devote limited resources to state institutions rather than community programs should not be entitled to deference." Id. at 1551-2.

plaintiffs: whether their institutionalization passed constitutional muster once treating professionals found that they, as individuals, no longer needed institutionalization, and in fact that it was injuring some of the class members, by causing regression as well as increased frustration and incidents of maladaptive behavior. The grant of summary judgment to the defendants was therefore erroneous and the case should be remanded for further proceedings.

When it granted the defendants' motion for summary judgment, the district court had to have concluded that either (1) there was no genuine issue of material fact with regard to the central issue of the exercise of professional judgment, or (2) the plaintiffs' evidence was irrelevant. The record reflects, however, that the issue of the appropriateness of treatment was in fact disputed by the parties, and that summary

judgment should not have been granted for that reason. Moreover, previous decisions by this Court and other circuits have established the relevance of the judgments of treating professionals. For these reasons, plaintiffs urge this Court to vacate the Eleventh Circuit opinion and remand the matter for trial.

C. The Eleventh Circuit's affirmance of the summary judgment eviscerates Youngberg, Jackson, and Parham.

This Court has consistently held that institutional confinement is a "massive curtailment of liberty" that requires special justification. Humphrey v. Cady, 405 U.S. 479, 509 (1972). Individuals have a "substantial liberty interest in not being confined unnecessarily for medical treatment..." Parham, 442 U.S. at 600. The nature and duration of the confinement must be related to its purpose, or the confinement unconstitutionally infringes on

the individual's fundamental right to liberty. McNeil v. Director, Patuxent Institution, 407 U.S. 245 (1972); Jackson v. Indiana, 406 U.S. 715 (1972). Liberty is more than simply the right to live without confinement, but includes the right to personal autonomy. Clark v. Cohen, 794 F.2d 79, 96 (3rd Cir. 1986) (Becker, J., concurring) (citing cases), cert. denied, 479 U.S. 962 (1986). "Institutionalized mental patients must live in unnatural surroundings under the continuous and detailed control of strangers." Parham, 442 U.S. at 626 (Brennan, J., concurring and dissenting).

Youngberg builds upon that notion, and holds that restrictions on liberty may be justified as long as independent professional judgment is exercised with respect to the particular restriction at issue. For instance, if restraints are necessary

in the individual case, they are not an unconstitutional infringement on liberty.

Thus Youngberg establishes the method by which a court should address the Jackson problem: that is, how long and under what circumstances a state may confine an individual. Jackson holds that the nature and duration of the confinement must bear some relation to its purpose. S.H. v. Edwards, 860 F.2d at 1057 (Clark, J., dissenting) (applying Jackson). Youngberg requires courts to look to professional judgment to determine if confinement - or any other restraint on liberty - has a purpose which will justify it. In the instant case, the Eleventh Circuit has ignored the individualized nature of the required professional judgment, and held flatly that if some professional opines that restrictions on liberty are generally acceptable for a class of persons, there is not only no

constitutional violation, but there is no triable issue, notwithstanding contradictory professional opinions for individuals.

The error of this standard is illuminated by examining what it permits. If the Eleventh Circuit's rule were applied to Nicholas Romeo, for instance, restraining him would be constitutionally acceptable so long as the use of restraints was generally accepted by professional judgment. No individualized judgment, with respect to Mr. Romeo's needs or specific liberty interests, would be required. Furthermore, if an institutionalized individual is incorrectly medicated, no judicial review would be permitted so long as the defendants submitted an affidavit alleging that medication of such institutionalized individuals is generally within professionally acceptable standards. As another example, the decision to provide, or not to provide,

training related to ambulation, regardless of the individual's needs, would be unassailable so long as the defendant submitted an affidavit asserting that physical therapy is sometimes needed, or conversely, is sometimes not needed by the retarded as a group. Generalized restrictions on visitation would be permissible so long as an affiant testified that such restrictions are generally professionally acceptable. If summary judgment is valid in the instant case, based on the generalized affidavits submitted by the defendants and with no inquiry into the individualized needs of the plaintiffs, then summary judgment is likewise appropriate in any of the aforementioned situations. Yet it was precisely the individualized judgment on which Nicholas Romeo's treatment was based that moved this Court to insulate the treating professionals from liability for damages.

Like all constitutional rights, the right to liberty is not absolute. A state's interest may, on balance, justify infringement of an individual's liberty interest. This Court in Youngberg applied the well-established balancing test to analyze Nicholas Romeo's liberty claims. That test requires consideration of "(1) the needs of the individual plaintiffs, (2) the nature of the confinement which they face in institutions, and (3) the State's asserted reasons for so confining them". S.H. v. Edwards, 860 F.2d at 1061 (Judge Clark, dissenting) (emphasis supplied). Youngberg held:

> A court properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy...may be stated as that training which is reasonable in light of identifiable liberty interests and the circumstances of the case.

457 U.S. at 319 n.25. This analysis is

dependent upon the facts of each case, and courts must rely heavily on professional judgment to determine what is appropriate in the individual circumstances of each case. As Judge Clark pointed out below, however, the consideration of the needs of the individual plaintiffs "was aborted by the grant of summary judgment." 860 F.2d at 1061. The fear expressed by Judge Clark in his dissent is real -- notwithstanding the facts of a given situation and contemporaneous professional judgment as to treatment needs, an artful defendant can always meet the test established by the Eleventh Circuit.

Youngberg established the principle that if professional judgment is exercised with respect to the particular liberty infringement which is challenged, courts may not second-guess that infringement. In the instant case, however, the grant of

summary judgment precluded the determination of whether professional judgment had been exercised in the individual case.

Neither the Eleventh Circuit nor the district court undertook the Youngberg balancing test. Had the matter gone forward to trial, the plaintiffs would have greatly amplified the record on the factors relevant to the Youngberg test. See, 860 F.2d at 1060-1061 (Judge Clark, dissenting) (Consideration of such facts was "aborted by the grant of summary judgment"; these were "facts that needed to be developed at a trial.") As it is, however, the record still reflects certain important facts.

1. The needs of the plaintiffs

The district court found that the treating professionals for hundreds of the plaintiffs recommended that the plaintiffs no longer need instititutionalization, but are in need of community settings. Plain-

tiff S.H., for instance, who had been initially institutionalized in 1967, had been recommended for community placement as early as 1979. 860 F.2d at 1049. Her medical records, which were submitted to the court, reflected her increasing frustration and the regression in her skills and adaptive behavior due to her continued institutionalization. Her treating professionals repeatedly noted that her needs were not being met in the institution.

Documents obtained from the defendants and submitted to the court by the plaintiffs stated the defendants' own belief that persons "do not develop fully or properly in an atypical environment such as an institution. Before people can have any understanding of what is socially acceptable and desirable, they must have the experience of taking responsibility for themselves in their physical and social envi-

ronments. People not given the opportunity for such experiences often have difficulty participating in society." See, "Community Residential Services for Individuals Who are Mentally Retarded: Some Commonly Asked Questions (1982)", prepared by the Georgia Department of Human Resources, and submitted below as Exhibit 33, with Plaintiffs' Motion for Summary Judgment. In short, even the limited evidence which was before the district court established that hundreds of the plaintiffs do not need institutionalization, are being harmed by it, and need community services.

2. The nature of the confinement which the plaintiffs face.

The plaintiffs asserted liberty interests in avoiding unnecessary institutionalization and in avoiding the stigma and injury caused by institutionalization. S.H. v. Edwards, 860 F.2d at 1060-1061

(Judge Clark, dissenting). Judge Clark believed there was sufficient evidence in the record to warrant a trial to assess the injury to these interests.

3. The state's reason for confining the plaintiffs.

The defendants never offered any reason for the indefinite institutionalization of the plaintiffs, arguing instead that they were under no obligation -- constitutional or statutory -- to provide services of any different nature. The evidence showed, however, that they had utterly failed, even using funds they had earmarked for community residential services amounting to nearly $5,000,000 over a five year period, to develop services which would meet the plaintiffs' needs. See, 860 F.2d at 1054 (Judge Clark, dissenting).

The Eleventh Circuit concluded, without doing the required balancing test, that:

> The experts in this case agree that Georgia's decision to keep these plaintiffs in institutional settings until community facilities can be made available does not deviate from professionally accepted standards.

860 F.2d at 1046. By this stroke of the pen, the court condoned institutionalization that is not justified by any analysis of the plaintiffs' competing interests in and need for liberty. Under the Eleventh Circuit's test, confinement of the plaintiffs need not be limited in length to the purpose for which it was begun, namely, to habilitate the plaintiffs to enable them to function in the community. Under this holding, the State of Georgia may institutionalize individuals until such time as it sees fit to develop more appropriate community residences, notwithstanding the judgment of the individuals' treating professionals that they no longer need institutionalization, or that the institution is

injurious to them. Under this standard, the State is under no obligation to ever refrain from arbitrarily infringing on the plaintiffs' liberty interest[10/].

This Court's precedents will not tolerate this result. The plaintiffs should have been allowed to go to trial to establish all the facts relevant to the balancing test set out in Youngberg. Cf., Taylor v. Ledbetter, 818 F.2d 791, 795 (11th Cir. 1987) (in banc) (discussing balancing test required to assess liberty interest), cert. denied, ___ U.S. ___, 109 S.Ct. 1337

10/ In Wolff v. McDonnell, 418 U.S. 539, 555-556 (1974), this Court said: "[A] prisoner is not wholly stripped of constitutional protections when he is imprisoned for crime." See also, Youngberg, 457 U.S. at 315-316. Under the Eleventh Circuit's holding, however, the plaintiffs have been stripped of any right to challenge inappropriate and harmful deprivations of liberty. Moreover, the "touchstone of due process...[is] protection of the individual against arbitrary action of government", Wolff, 418 U.S. at 558. Here the State may arbitrarily confine the plaintiffs forever.

(1989). Plaintiffs urge this Court to grant their Petition for a Writ of Certiorari and remand this matter for a trial on those issues.

II. **THE COURT ERRED IN FAILING TO FIND THAT INSTITUTIONALIZATION CONTRARY TO THE CRITERIA SPECIFIED IN GEORGIA LAW INFRINGES A STATE-CREATED LIBERTY INTEREST AND IS THEREFORE UNCONSTITUTIONAL.**

The circuit court ignored the well-settled principle that a state may create a constitutionally-cognizable liberty interest by its own laws. See, e.g., Board of Pardons v. Allen, 482 U.S. 369, ___, 107 S.Ct. 2415, 2418 (1987); Hewitt v. Helms, 459 U.S. 460 (1983); Mills v. Rogers, 457 U.S. 291, 300 (1982). In this case, the plaintiffs argued below[11/] that Georgia had done just that in its statutory scheme

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11/ This posture differs, therefore, from that in DeShaney v. Winnebago County Department of Social Services, ___ U.S. ___, 109 S.Ct. 998, 1003 n.2 (1989), and Youngberg, 457 U.S. at 316 n. 19.

providing services for the mentally retarded, in the Mental Health Code generally, O.C.G.A. § 37-1 et seq., and in the Habilitation of the Mentally Retarded Act, O.C.G.A. §§ 37-4-1 through 37-4-127 ("Habilitation Act"), and the Community Services for the Mentally Retarded Act, O.C.G.A. §§ 37-5-1 through 37-5-10 ("Community Services Act") in particular. These statutes contain the mandatory, duty-creating language which has been held to create a liberty interest under state law. Hewitt, 459 U.S. at 471-472.

The Habilitation Act allows institutionalization when three conditions are all met: (1) adequate and appropriate services for the individual cannot be found outside the institution, (2) the individual needs twenty-four hour training in a residential care facility, and (3) the individual needs direct medical services. The statute pro-

vides that the court "shall not order...admission" unless each of these conditions are met, and conversely requires discharge when they are not met. O.C.G.A. § 37-4-40(f). Further, the Habilitation Act states that:

> It is the policy of the state that the least restrictive alternative placement be secured for every client at every stage of his habilitation. It shall be the duty of the facility to assist the client in securing placement in noninstitutional community facilities and programs.

O.C.G.A. § 37-4-121, and further:

> Each client in a facility and each person receiving services for mental retardation shall receive habilitation that is suited to his needs and is the least restrictive appropriate habilitation.

O.C.G.A. § 37-4-122(a).

In the Community Services Act, the State of Georgia assumed a duty to establish and provide community-based services to all of its mentally retarded citizens. See, e.g., O.C.G.A. § 37-5-1 ("...services

shall be made available..."; "...shall... provide community-based alternatives...") By so doing, the State has struck the balance discussed in Mills between the individual's right to liberty and the state's interest in infringing that liberty, and opted for an expansive individual right that may, in fact, be broader than what would be required under the United States Constitution alone.[12/] Cf., Taylor v. Ledbetter, 818 F.2d 791, 798-800 (11th Cir. 1987) (in banc), cert. denied, ___ U.S. ___, 109 S.Ct. 1337 (1989). Both the cir-

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12/ The Georgia Supreme Court has recently acknowledged "a public policy of this state to provide some form of mental treatment to its citizens," established in the Georgia Mental Health Code, O.C.G.A. § 37-2-1 et seq., and other statutes. Lewis v. Griffin, ___ Ga. ___, 376 S.E.2d 364 (1989). As in Mills v. Rogers, 457 U.S. 291 (1982), discussed infra, this further supports the plaintiffs' request to vacate and remand the Eleventh Circuit's opinion, for further consideration of the scope of state-created rights and their protection under the United States Constitution.

cuit court and the district court completely ignored this claim.

In Mills v. Rogers, 457 U.S. 291 (1982), the plaintiffs challenged the nonconsensual administration to them of certain antipsychotic drugs. Shortly after this Court granted certiorari, the Supreme Judicial Court of Massachusetts held that a noninstitutionalized but mentally incompetent person had a right to decide for himself whether to submit to such medication. This Court opined that that case could have an impact on the issue in Mills, and remanded the case to the Court of Appeals for further consideration of the nature of the state-created liberty interest recognized by the state court, whether it might be broader than that under the United States Constitution, and the nature of required due process, either under state or federal principles. The Mills Court stated "[i]f

the state interest is broader, the substantive protection that the Constitution affords against the involuntary administration of antipsychotic drugs would not determine the actual substantive rights and duties of persons in the State of Massachusetts." 457 U.S. at 303 (emphasis in original). Further, the Court said, "[t]o identify the nature and scope of state interests that are to be balanced against an individual's liberty interests, this Court may look to state law." 457 U.S. at 304.

In this case, therefore, the lower courts should have looked to state law to determine both the nature of the individual's liberty interests and the state's interest in infringing them. The Georgia statutes referred to above have struck a balance between the individual's liberty interest and the state's parens patriae

interest which mandates community placement for all persons who can be appropriately served, in accordance with professional judgment, in the community.

The failure of the State to abide by that mandate is redressable under the Due Process Clause of the Fourteenth Amendment to the United States Constitution. Most cases involving state-created liberty interests which are entitled to federal constitutional protections have been brought by prisoners allegedly deprived of various liberty interests claimed to be established in parole or other release procedures. Cf., Board of Pardons v. Allen, 482 U.S. 369 (1987); Vitek v. Jones, 445 U.S. 480 (1980). The outcome of those cases depends on an analysis of the particular language in the statute or policy at issue. See, Allen, supra, 482 U.S. at ____, n. 10, 107 S.Ct. at 2421 n. 10. Even where discretion

is allowed with respect to release decisions, if the statute dictates release when certain findings are made, a liberty interest arises to which due process protections attach. Allen, 482 U.S. at ___, 107 S.Ct. at 2422. In this case, institutionalization of the mentally retarded may not continue, under Georgia law, unless certain findings are made. If the State abrogates the liberty interest defined by that statute, federal constitutional remedies are appropriate. The "expectancy of release" is entitled to protection under the Due Process Clause. Greenholtz v. Nebraska Penal Inmates, 442 U.S. 1, 12 (1979).

Where, as here, state statutes require the provision of community services to individuals who are capable of enjoying them, those individuals possess a liberty interest which the state may not deny. See also, Johnson by Johnson v. Brelje, 701

F.2d 1201 (7th Cir. 1983). There the court found that Illinois law created a right in criminal defendants found unfit to stand trial to be provided with adequate and humane care in the least restrictive environment. This became a "state-created liberty interest that is entitled to the protection of the federal due process clause." 701 F.2d at 1205. Since the state had established the right, the court found no need to reach the question of whether the federal constitution established a similar liberty interest.

In Whitehorn v. Harrelson, 758 F.2d 1416 (11th Cir. 1985), the court held that whether a state statute creates a liberty interest is a factual issue, requiring the district court to look at statutes, regulations, and actual practices. The court noted that a state creates such an interest where it places limits on official discre-

tion. Compare, Hewitt v. Helms, 459 U.S. 460 (1983) and Olim v. Wakinekona, 461 U.S. 238 (1983).

Georgia has placed limits on official discretion to institutionalize its retarded citizens by establishing the criteria which must be met to justify confinement. See, O.C.G.A. § 37-4-40 et seq., discussed above. This issue was vigorously briefed and argued by the plaintiffs, and it should have been a way to effectuate discharge. The Georgia Community Services Act creates a duty to serve which was not addressed, in the context of the plaintiffs' asserted liberty interest, by either lower court. Neither the district court nor the Eleventh Circuit undertook to inquire whether the defendants are violating the plaintiffs' liberty interest under Georgia law by abusing the limited discretion vested in them to decide to continue institutional con-

finement, notwithstanding the recommendations of professionals that release is appropriate. This matter should be remanded for that determination.

CONCLUSION

For all the foregoing reasons, the plaintiffs urge this Court to grant their Petition for a Writ of Certiorari to the Eleventh Circuit Court of Appeals, find that the lower courts improperly entered and affirmed summary judgment to the defendants in this case, and remand this case for further proceedings concerning the appropriateness of the confinement of the plaintiffs in light of their treating professionals' judgment, and their liberty interests under Georgia law.

Respectfully submitted,

_____

PHYLLIS J. HOLMEN

(signatures continued on next page)

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APPENDIX

DECISION OF THE COURT OF APPEALS

S.H. and P.F., individually and on behalf of all others similarly situated, Plaintiffs-Appellants,

v.

Joe EDWARDS and R. Derrel Gay, individually and in their official capacity, Defendants-Appellees.

No. 87-8635.

United States Court of Appeals, Eleventh Circuit.

November 28, 1988.

Appeal from the United States District Court for the Northern District of Georgia.

Before FAY, Circuit Judge
CLARK, Circuit Judge
GONZALEZ*, District Judge

PER CURIAM:

The judgment of the district court and the rulings questioned on appeal are affirmed based upon and for the reasons stated in the thoughtful Order of Court entered on April 10, 1987 and appended

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* Honorable Jose A. Gonzalez, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation.

hereto.

The dissent criticizes our approach in this matter and consequently, we add these thoughts. The plaintiffs won the lawsuit. Extensive relief was afforded. Both the United States Magistrate and the District Judge entered substantial writings explaining the various rulings. In our opinion, nothing is gained by repeating that analysis. Where we part company is on the one issue of whether the plaintiffs have a substantive due process right, under the federal constitution, to habilitation in a community setting. The district court held in the negative and we agree. Judge Clark disagrees.

All agree that Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), is the guiding light but reasonable litigants, attorneys and judges disagree on its application. The plaintiffs in this case maintain that mentally retarded

patients fare better in community placements as opposed to institutional environments and that certain professionals have recommended that members of the alleged class be placed in such community facilities. The defendants agree, but suggest that not enough community facilities are available and that the institutional facilities being used do not deviate from accepted professional standards.

We agree with the Circuits[1] which interpret Youngberg as requiring states to provide habilitation in accord with prevailing standards of practice. The experts in this case agree that Georgia's decision to keep these plaintiffs in institutional settings until community facilities can be made available does not deviate from professionally accepted standards.

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1 Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2nd Cir. 1984); Phillips v. Thompson, 715 F.2d 365, 368 (7th Cir. 1983).

We join with Judge Clark in hoping that available funds will be used to secure more community type quarters. We disagree that plaintiffs have a constitutional right to such. The fact that the State of Georgia is trying to provide "better" facilities does not mean they are depriving plaintiffs of their constitutional rights by continuing to use institutions which the experts find are being operated in accord with sound professional standards.

AFFIRMED.

APPENDIX

S.H. and P.F. individually and on behalf of all others similarly situated, Plaintiffs

vs.

Joe Edwards and R. Derrel Gay, individually and in their official capacities, Defendants

Civil Action File No. C81-877A

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

ORDER OF COURT

This matter is before the court on the Report and Recommendation of the Magistrate ("Magistrate's Report"). The matter went before the Magistrate on cross-motions of the parties for summary judgment.

Procedural Background

Plaintiffs seek judgment upon the following issues: 1) whether defendants have violated plaintiffs' rights to due process under the Fourteenth Amendment to the Constitution of the United States by failing to provide to plaintiffs

adjudicatory reviews of their indefinite commitments; 2) whether defendants have violated plaintiffs' rights to equal protection under the Fourteenth Amendment by arbitrarily providing adjudicatory reviews to some institutionalized mentally retarded adults, but not to plaintiffs; 3) whether defendants' failure to provide to plaintiffs adjudicatory reviews of plaintiffs' commitments violates state law; 4) whether defendants' failure to provide to plaintiffs community services to relieve them from their indefinite confinement violates state law; and 5) whether plaintiffs are entitled to a full and complete remedy to make them whole for the constitutional injuries they have suffered. Defendants seek summary judgment on the entire complaint.

Magistrate's Recommendation

After a hearing on the cross-motions for summary judgment, the Magistrate issued

a Report and Recommendation which contains the following recommendations:

1. Plaintiffs' state law claims be dismissed;
2. Plaintiffs' be granted summary judgment on the issue of a right to a continued Rehabilitation Review Procedure (O.C.G.A. § 37-4-42) on both equal protection and procedural due process grounds;
3. Defendants be granted summary judgment on the issue of a right to community habilitation, on substantive due process grounds;
4. Defendants be granted summary judgment on all claims under Section 504 of the Rehabilitation Act (29 U.S.C. § 794 et seq.).

Plaintiffs object to the third and fourth recommendations, and defendants object to the second recommendation. The

court will address the second through fourth of the Magistrate's recommendations seriatim after setting forth certain material facts that will aid the disposition of these matters.

Statement of Certain Undisputed Facts

1. Plaintiffs S.H. and P.F. were residents of Gracewood State School and Hospital, a state owned and operated institution for the mentally retarded at the time this action was filed.

2. Plaintiffs represent a class consisting of all adult persons who are mentally retarded or otherwise handicapped, who have been, are now, or will be residents of state-owned or operated facilities for the mentally retarded, who since September 1, 1978, have been, are being, or will be denied access to due process hearing procedures which would determine their need for community placement and/or continued hospitalization.

3. S.H. and P.F. had been residents of Gracewood since before September 1, 1978.

4. Plaintiffs S.H. and P.F. were admitted to Gracewood without having received a commitment hearing.

5. S.H. was twenty-four years old when this action was filed. She had been a resident of state hospitals for approximately fifteen years at the inception of this action.

6. P.F. was thirty-five when this action was filed and had been a resident of state hospitals for twenty-five years.

7. Both S.H. and P.F. reached the age of 18 prior to September 1, 1978.

8. On September 1, 1978 defendants initiated procedures to review the continued institutionalization of adult residents of its mental retardation facilities as required by amendments to the Georgia statute governing the institutiona-

lization of retarded persons.

9. Persons who received such reviews had their need for continued institutionalization reconsidered after the first six months of their commitment and thereafter on an annual basis.

10. Persons who received such reviews, if continued commitment was deemed necessary after the initial commitment period of six months, had their cases reviewed by a panel of impartial professionals not involved in the residents' active treatment (the panels are known as Committees for Continued Habilitation Review).

11. Until April 1, 1979, following the reviews by the Committees for Continued Habilitation Review, residents received a hearing before a Department of Human Resources hearing examiner to determine their need for continued commitment.

12. At the hearing the persons

receiving the reviews have a right to counsel, a right to subpoena and cross-examine witnesses, a right to present evidence including independent evaluations of the continuing need for commitment, a right to have an alternative plan to receive services in a lesser restrictive environment presented to the hearing officer by the Department of Human Resources and the right to have findings of fact made by an impartial hearing officer.

13. After April 1, 1979, as a result of statutory amendments governing the provision of such reviews, following the reviews by the Committees for Continued Habilitation Review, all persons reviewed had their service plans reviewed by a hearing officer of the Department of Human Resources. A hearing was then held if the hearing officer chose to initiate one or if the resident or a representative requested that one be held.

14. Neither S.H., nor P.F., ever had a review of their continued commitment by a Continued Habilitation Review Committee prior to the commencement of this action. As a result neither S.H. nor P.F. received the "automatic" hearing before a Department of Human Resources hearing examiner during the period prior to April 1, 1979, nor thereafter, the opportunity to have their case reviewed by a hearing examiner, the opportunity to request that a hearing examiner hold a hearing, or notice of any right to make such a request.

15. As a result, neither S.H. nor P.F., was provided the opportunity to exercise the right to appointed counsel, or the right to have an alternative plan to receive services in a lesser restrictive environment developed by the Department of Human Resources or to exercise any of the other rights ancillary to a continued habilitation review hearing.

16. As of September 1, 1981, more than 1,000 mentally retarded institutionalized adults were not being afforded a review of their continued commitment by a Continued Habilitation Review Committee, nor the opportunity for further review received by the balance of mentally retarded institutionalized adults.

17. Such reviews had been provided to the balance of mentally retarded residents of Defendants' institutions since September 1, 1978.

18. Since September 1, 1978, it has been the practice of Gracewood only to process mentally retarded adults for such reviews if the individual had been committed to the institution by court order or if the individual had been admitted as a child and had become an adult since September 1, 1978.

19. In 1980, a project, known as Project P.R.O. or Preparing for Residential

Options, was undertaken for the Mental Retardation Section of the Division of Mental Health and Mental Retardation of the Georgia Department of Human Resources.

20. A final Project P.R.O. report was completed in January 1981.

21. The purpose of Project P.R.O. was to assist Defendants in assessing the comprehensive service needs of individual mentally retarded persons in need of alternative residential services, analyze the service needs of such persons in terms of type of services, cost of services, and the time frame for meeting those needs.

22. Project P.R.O. involved the assessment of 607 institutional clients identified by staff of Defendants' hospitals who would be more appropriately served in alternative residential services.

23. The data obtained by Project P.R.O. indicated that at least 30% of the institutionalized mentally retarded popu-

lation in Georgia would be more appropriately served in community residential options.

24. The data obtained by Project P.R.O. indicated that 213 mentally retarded residents of Gracewood State School and Hospital would be more appropriately served in an alternative residential placement.

25. The data obtained by Project P.R.O. indicated that 122 mentally retarded residents of Central state Hospital would be more appropriately served in an alternative residential placement.

26. The data obtained by Project P.R.O. indicated that 155 mentally retarded residents of Georgia Retardation Center at Atlanta would be more appropriately served in an alternative residential placement.

27. The data obtained by Project P.R.O. indicated that 55 mentally retarded residents of Southwestern State Hospital would be more appropriately served in an

alternative residential placement.

28. The data obtained by Project P.R.O. indicated that 38 mentally retarded residents of Northwestern Regional Hospital at Rome would be more appropriately served in an alternative residential placement.

29. The data obtained by Project P.R.O. indicated that 9 mentally retarded residents of Georgia Retardation Center at Athens would be more appropriately served in an alternative residential placement.

30. All institutionalized mentally retarded residents have their individualized program plans reviewed on an annual basis by an interdisciplinary team.

31. Institutionalized mentally retarded individuals who are not under a court order are not advised of a right to have decisions of the interdisciplinary team reviewed or of any hearing rights should they disagree with the decision of their interdisciplinary team.

32. Interdisciplinary teams which perform reviews do not have authority to order that a person be discharged.

33. During their residency in Defendants' hospitals, S.H. and P.F. were recommended by hospital staff for community placement.

34. The person in charge of S.H.'s habilitation program at Gracewood was of the opinion, since 1979, that S.H. did not need to be at Gracewood, but should be placed in a community placement.

35. Defendants admit that they have not provided a placement and the necessary community services in an alternative community placement for all residents of its mental retardation facilities for whom it has been suggested or recommended that such an alternative placement might be or would be appropriate.

36. Defendants admit that they did not provide to Plaintiffs S.H. and P.F.,

neither community alternatives to institutionalization, nor the necessary community services during the period from September 1, 1978 to May 11, 1981.

Right to a Continued Rehabilitation Review Procedure (O.C.G.A. § 37-4-42).

Defendants object to the Magistrate's recommendation that this court adopt his due process analysis on the grounds that (1) the Magistrate has not considered whether a protectable interest was raised by plaintiffs before he determined what procedure is required to protect that alleged protectable interest, and (2) if plaintiffs do have a protectable interest, the treatment review procedures which the defendants provide to plaintiffs are sufficient to protect any liberty interest the plaintiffs may have.

The court is not persuaded by the defendants' objections. The Magistrate reports that the protectable interest, here, is the right to personal liberty and

freedom. Magistrate's Report and Recommendation, page 14. Citing Youngberg v. Romero, [sic] 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982), the Magistrate reports that mentally retarded individuals retain an interest in safety, freedom of movement, and certain forms of training during confinement. Furthermore, the Magistrate notes that the right not to be inappro-priately stigmatized by hospitalization is a protectable interest under the Fourteenth Amendment due process clause, as well. Parham v. J.R., 442 U.S. 584, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979). This court agrees with the Magistrate's recommendation regarding the Fourteenth Amendment due process issue for the following reasons.

Defendants apply the correct Fourteenth Amendment due process test, as set forth in Board of Regents of State Colleges v. Roth, 408 U.S. 564, 569, 92 S.Ct. 2701,

2705, 33 L.Ed. 548 (1972), but miss the mark in reaching the appropriate result. Citing Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), defendants argue that there is no right to treatment of mentally retarded persons in a community residential placement, and therefore, no protectable liberty interest pursuant to the Fourteenth Amendment due process provision.

The Magistrate's recommendation on the procedural due process question is not as broad as defendants suggest, however. The Magistrate has wisely discerned that the plaintiffs in this case stand to lose the opportunity for habilitation in a less restrictive setting should the O.C.G.A. § 37-4-42 review process determine that a less restrictive setting would better serve their needs. Magistrate's Report at 15. The Magistrate continues by stating that

> [c]ontinued confinement would

> be 'erroneous' if the length and conditions of the confinement do not bear any relation to the purpose of the confinement. In the case of the plaintiffs, habilitation is the purpose of their confinement. Inappropriate institutionalization and treatment can result in actual regression of the individual's skills and not merely a simple failure to improve. Georgia Ass'n of Retarded Citizens v. McDaniel, 511 F.Supp. 1263 (N.D. Ga. 1981). The record indicates that many institutionalized persons would be better served in community placements. (Citation omitted).... If formal continued Habilitation Reviews [pursuant to O.C.G.A. § 37-4-42] were available to plaintiffs, their release [or, "transfer from institutions to community placements"] would be facilitated by placement on the waiting list for community services. (Citation omitted).

Id. at 15-16.

Defendants argue that plaintiffs have not alleged that they have been inappropriately institutionalized, and therefore, the court should not utilize the language of Georgia Association of Retarded Citizens. Defendants' argument does not persuade this court. The record indicates that although many of the members of plain-

tiffs' class have been recommended for discharge by hospital review teams, they remain hospitalized because they are not placed on the community placement waiting list as a result of their denial of the formal habilitation review process. Plaintiffs' Exhibits in Support of Motion for Partial Summary Judgment, No. 18, pp 1, 12. Continued institutionalization under the circumstances set forth above is not appropriate.

This court is acutely aware of the admonition, articulated in Youngberg, supra, that the lower federal courts "show deference to the judgment exercised by a qualified professional" when determining whether a state institution has provided a mentally retarded patient "with such training as an appropriate professional would consider reasonable to ensure his safety and to facilitate his ability to function free from bodily restraints." 102 S.Ct. at

2461. However, that Court specifically noted that "[i]t may well be unreasonable not to provide training when training could significantly reduce the need for restraints or the likelihood of violence." Id. Unlike the facts in Youngberg, the plaintiffs in this case are not so situated that no amount of training can help them. The court finds that it is unreasonable that plaintiffs have not been placed on the community placement waiting list despite recommendations of defendants' own professional staff.

When the Magistrate's observations are viewed against the backdrop of the above Youngberg language, it is apparent that a protectable Fourteenth Amendment liberty interest exists in this case. Defendants have not shown good reason why members of the plaintiff class have not been afforded the hearings prescribed by O.C.G.A. § 37-4-42. For the above, and other reasons pre-

sented by the Magistrate, the court finds that defendants' failure to provide plaintiffs with the continued habilitation reviews, which could facilitate plaintiffs' access to more appropriate treatment, violates the plaintiffs' procedural due process guarantees.

Accordingly, the court agrees with the Magistrate that plaintiffs are entitled to the continued habilitation review procedure on procedural due process grounds.

Defendants also argue that they have not violated the plaintiffs' equal protection rights. Suffice it to say, the court is not persuaded by the defendants' argument that the plaintiffs are not similarly situated to other classifications of patients who receive continued habilitation reviews. The court disagrees with defendants' contention that plaintiffs retain a status of voluntary admittees merely because they were voluntarily admitted before

1978. It is established that a voluntary admittee's status changes to that of an involuntary admittee upon an institution's, or the state's, refusal to grant her discharge upon her request. Doe v. Public Health Trust of Dade County, 696 F.2d 901, 903 n.10 (11th Cir. 1983).

Thus, this court agrees with the Magistrate's finding regarding the equivalence of review procedures of the pre- and post-1978 admittees. The formal continued habilitation review procedures offer the plaintiffs much more protection than the informal review procedures currently being exercised by the various hospitals. Moreover, the court agrees with the Magistrate that the extension of the continued habilitation review procedures will not financially overburden the state, in view of the fact that the mechanism for such reviews is already in place.

Substantive Right to Community Residential Placements

This court agrees with the Magistrate, via analysis which differs from that of the Magistrate, that plaintiffs have no substantive due process right to habilitation in a community setting. This position is supported by the conclusions reached in a number of cases. E.g., in Youngberg, the Supreme Court held that a state has no constitutional duty to provide substantive services for those within its borders; the Seventh Circuit Court of Appeals has held that where a state denied community placement to mentally retarded individuals, and instead, placed them in state institutions, no substantive due process to liberty was violated if that decision were based on professional judgment. Phillips v. Thompson, 715 F.2d 365, 368 (7th Cir. 1983). Moreover, the Second Circuit has held that there is no "entitlement to community

placement or a 'least restrictive environment' under the federal Constitution." Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239, 1248 (2d Cir. 1984). This court is persuaded by the rationale of Cuomo, and shall rule upon this matter accordingly.

The court notes that in Pennhurst State School & Hospital v. Halderman, 465 U.S. 89, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), the Supreme Court ruled that the plaintiffs in that action were barred by the Eleventh Amendment from obtaining relief in federal court based on allegations that the state or its officials violated state law. Cuomo at 1248. "Thus, any relief granted to plaintiffs in this action must be based on either[,] federal statutes[,] or the federal Constitution." Id. As to this issue, no federal statutes apply,[1]

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[1] The Section 504 claim will be addressed infra.

thereby leaving this court to determine whether the federal Constitution provides an entitlement to community place-ment or a least restrictive environment. See, Cuomo at 1248.

Citing Youngberg, the Second Circuit stated that due process is satisfied if restraints are imposed on mentally retarded individuals in accordance with the judgment of qualified professionals, and that courts should defer to that professional judgment. Id. The Cuomo court elaborated that the Youngberg professional judgment standard is not insufficiently met merely because pertinent medical experts disagree with the care or treatment decisions that were actually made. Id. "Rather, it is a standard that determines whether a particular decision has substantially met professionally accepted minimum standards." Id. If the decision is made by a pro-fessional, it is presumptively valid; liability may be im-

posed only when the decision by the professional is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment. Id.

In this case before the court, the parties have filed various affidavits which correspond to the language in Cuomo regarding expert medical testimony which does not agree. Specifically, the parties have stipulated that mentally retarded patients fare better in community placements as opposed to institutional environments, and that certain professionals within the Georgia system have recommended that members of the plaintiffs' class be placed in community living situations. However, premised upon affidavits of Richard Hagen, Joanne Miklas, Dr. Donald Dunagan, and Bernard Wagner, the court finds that defendants' decision to treat plaintiff in the

institutional setting does not deviate from professionally accepted standards. See, Id.

In light of the above finding, this court's responsibility is met regarding the issue of answering the substantive due process question. "Even if every expert ... agrees that another type of ... residence setting might be better, the federal courts may only decide whether the treatment or residence setting that actually was selected was a 'substantial departure' from prevailing standards of practice." Cuomo, 737 F.2d at 1248-1249 (citing 457 U.S. at 323, 102 S.Ct. at 246 ("[i]t is not appropriate for the courts to specify which of several professionally accepted choices should have been made")). Therefore, this court holds that retaining residents at the various defendant institutions is not 'such a substantial departure from accepted professional judgment, practice[,] or standards as to demonstrate that

the person responsible actually did not base the decision on such a judgment." See Cuomo, at 1249 (citing 457 U.S. at 323, 102 S.Ct. at 2462). Thus, the minimum professional standards are satisfied. Id.

Section 504

This court is not persuaded by plaintiffs' objections to the Magistrate's Report and Recommendation regarding his finding on the Section 504 claims of plaintiffs. Nor does the court adopt the Magistrate's rationale that Section 504 does not apply to situations wherein groups with varying degrees of handicap are treated differently. However, it adopts the Magistrate's recommendation that defendants be granted summary judgment on the Section 504 issue because the facts of this case do not support the contention that plaintiffs were denied O.C.G.A. § 37-4-42 habilitation reviews "solely by reason of [their] handicap," as the statute requires. 29

U.S.C. § 794.

Apparently, the state legislature felt the need to establish a chronological bright-line as a means of triggering the habilitation review requirements, and it exercised its legislative prerogative in establishing September 1, 1978 at that bright-line.

Conclusion

The court

1. GRANTS defendants' motion for summary judgment on plaintiffs' state law claims;

2. GRANTS plaintiffs' motion for summary judgment on plaintiffs' right to receive O.C.G.A. § 37-4-42 continued habilitation reviews;

3. GRANTS defendants' motion for summary judgment regarding substantive due process right to least restrictive treatment;

4. GRANTS defendants' motion for

summary judgment on plaintiffs' Section 504 claims.

SO ORDERED, this 10th day of April, 1987.

/s/Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

CLARK, Circuit Judge, dissenting:

This case concerns the constitutional rights of the mentally retarded. It is the first case of its kind to come before this court since the Supreme Court's decision in Youngberg v. Romeo, 457 U.S. 307, 102 S.Ct. 2452, 73 L.Ed.2d 28 (1982). I am at a loss to understand the majority's failure to give a thorough appraisal of the issue presented here.

The issue is: May an agency of the State of Georgia constitutionally confine a mentally retarded person in a ward in an institution contrary to that person's professional adviser's recommendation? In this case "the person in charge of S.H.'s habilitation program at Gracewood was of

the opinion, since 1979, that S.H. did not need to be at Gracewood, but should be placed in a community placement." Statement of Certain Undisputed Facts, No. 33, District Court Opinion at 7. The Supreme Court in Youngberg stated: "[T]he decision, if made by a professional, is presumptively valid." 457 U.S. at 323, 102 S.Ct. at 2462 (defining "professional" in n.30). Instead of conducting a hearing, the district court granted summary judgment on the basis of these affidavits: "[T]he care provided to the mentally retarded persons at Gracewood State School and Hospital falls within the range of acceptable professional judgment...." Record, Vol. III, Tab 53 at Exhibit E. "[T]he care, training, treatment and habilitation received by residents at the Georgia Retardation Center in Atlanta falls within the range or acceptable professional judgment...." See id. at Exhibit D.

Thus, the district court accepted a broad generalized affidavit in support of the treatment of all retarded persons housed at Gracewood instead of the specific affidavit pertaining to plaintiff S.H. In doing so the district court ignored the applicable Georgia Law:

> Each client in a facility and each person receiving services for mental retardation shall receive habilitation that is suited to his needs and is the least restrictive appropriate habilitation.

Ga. Code Ann. § 37-4-122(a) (1982).

Because the district court misapplied Youngberg, disregarded the law of Georgia and our circuit, and erred in granting the defendant summary judgment on this important issue, I must dissent.

I. Plaintiffs' Due Process Claim.

The plaintiff class in this case is composed of mentally retarded persons who reside in institutions operated by the

State of Georgia.[1] When this action was filed in 1981, the named plaintiffs were residents of the Gracewood State School, a state-owned facility. Like the named plaintiffs, the remaining members of the class reside in five similar institutions, which provide around the clock residential services to mentally retarded persons under the control and supervision of the Georgia Division of Mental Health, Retardation, and Substance Abuse.

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[1] The district court's opinion contains what it refers to as a "Statement of Certain Undisputed Facts." For the purposes of assessing those claims on which the defendants were granted summary judgment our duty is clear. We must read the record in the light most favorable to the plaintiffs, accept their allegations as true, and give them the benefit of the doubt where their assertions conflict with those of the defendant. C. Wright, A. Miller & M. Kane, 10 Federal Practice and Procedure § 2716 at 643-46 (1983 & Supp. 1987) (citing Bishop v. Wood, 426 U.S. 341, 347, 96 S.Ct. 2074, 2079, 48 L.Ed.2d 684 (1976); Trust Company Bank v. MGM/UA Entertainment Co., 772 F.2d 740, 743-44 (11th Cir. 1985); Anderson v. Winter, 631 F.2d 1238, 1240 (5th Cir. 1980)) (other citations omitted).

Georgia statutes that govern the confinement and care for the mentally retarded were substantially amended in 1978. As a result of these changes, the State was required to provide certain judicial process safeguards for each mentally retarded person it undertook to institutionalize after September 1, 1978. Each person after institutionalization was entitled to a periodic review of his or her ongoing need for institutionalization and its appropriateness. See, generally, Ga. Code Ann. § 37-4-42. Yet the defendants did not make these procedures available to members of the plaintiff class, who were all committed to institutions prior to September 1, 1978. As of September 1, 1981, there were more than 1,000 mentally retarded residents of institutions who had not been provided with any reviews and thus the opportunity for further administrative or judicial review. These facts constituted

the basis of the plaintiff class's equal protection claim (Count I) and the procedural aspect of their due process claim (Count II). As is clear from the district court's opinion, the plaintiffs prevailed on these issues. The district court concluded that the plaintiff class was to be placed on equal footing with post-1978 institution admittees for the purpose of habilitation reviews.

On this issue the plaintiffs were successful and the defendants have not appealed the district court's rulings with regard to the procedural process claim. The issues related to this claim are not before this court. It should be therefore noted that although the majority is publishing the district court's opinion as its own, the section discussing this claim constitutes no more than dicta. See, generally, 1B Moore's Federal Practice 0.402[2] (1984).

II. The Substantive Due Process Claim.

A. The facts.

In 1972, the Georgia legislature made the following statutory declaration in the "Community Service for the Mentally Retarded Act":

> Since the State of Georgia accepts a responsibility for its mentally retarded citizens and an obligation to them which it must discharge, facilities, programs, and services shall be made available to meet the needs of each mentally retarded person during his entire lifetime. The primary purpose of this chapter shall be to provide community-based alternatives to total institutional care so that mentally retarded individuals can continue to live in their home communities.

Ga. Code Ann. § 37-5-2. As for the implementation of this policy, the Act provides this "[t]imetable":

> The [Georgia] [D]epartment [of Human Resources] shall employ sufficient professional and nonprofessional persons to assure full implementation of this
>
> chapter by June 30, 1978. All community services specified in [Ga.Code Ann. §] 37-5-3 shall be

> made for all mentally retarded individuals by June 30, 1978.

Ga. Code Ann. § 37-5-10. The "community services" referred to in the timetable are

> all community-based services deemed reasonably necessary by the department to provide for education, training, rehabilitation, and care of mentally retarded in-dividuals [including] but not limited to: ... community residential services such as group family-care homes....

Ga. Code Ann. § 37-5-3(1).

In 1980, the appellees, through a project known as Project P.R.O. (Preparing for Residential Option), assessed the service needs of individual mentally retarded persons in the defendants' institutions. Project P.R.O. identified 607 persons who were in immediate need of alternative living placements and would be more appropriately placed in the State's residential living arrangements. Yet, as of the June 1982, 525 of the 607 persons identified as in need of community placements remained institutionalized.

This failure to so place those identified by Project P.R.O does not appear to have been due to a lack of funding. Between fiscal year 1977 and fiscal year 1982, the appellees allowed $1,113,156 in funds appropriated for community residential services to lapse, be transferred to other programs, or go otherwise unspent. During the same time period, the appellees likewise handled $263,022 in funding appropriated for moderate training residences or group homes. The total amount of funding appropriated for community programs for the mentally retarded that the appellees permitted to lapse or go unspent reached nearly $5,000,000 during this time period.

The district court's statement of undisputed facts sets forth the central fact: treatment professionals responsible for members of the plaintiff class have recommended that they be removed from the

institutions in which they currently reside and placed in community living arrangements. The State has not so placed them. District Court Op. at 7.[2]

On the basis of this central fact, the plaintiffs raised the one claim that is relevant here: they maintained that because their confinement conditions in institutions are not suitable for their individual needs, such confinement violates Georgia law and the Due Process Clause of the Fourteenth Amendment. This claim was

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[2] Subsequent to the filing of this lawsuit, it appears that the defendants have placed some members of the class, including the named plaintiffs, in community-based living arrangements. This does not mean, and the defendants have not argued, that the claims of the remaining class members (still institutionalized) are moot. See, Franks v. Bowman Transportation Co., Inc., 424 U.S. 747, 96 S.Ct. 1251, 47 L.Ed.2d 444 (1976).

premised on 42 U.S.C. § 1983.[3] The court held that although the plaintiffs have an equal right to habilitation reviews, there is no constitutional impediment to keeping them in institutions indefinitely, even if

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[3] They also argued that they were denied, on the basis of their handicaps, rights and privileges which the State affords other persons, and that this disparate treatment constituted a violation of Section 504 of the Rehabilitation Act, 29 U.S.C. § 794. This claim was supported by the fact that mentally retarded persons outside of the plaintiff class were receiving precisely those state procedural reviews and services sought by the plaintiffs. The only distinction between this class of persons and the plaintiff class was the date on which they came under the State's care. The essence of the plaintiff's Section 504 claim was that it afforded them a right to seek statutory habilitation reviews (under Ga.Code Ann. § 37-4-42) and to receive services in accordance with the judgment of their treatment professionals. As the defendants concede, the district court failed to address the substantive aspect of the plaintiffs' Section 504 claim. It is clear, however, that the district court's ruling would have applied with equal force since it held that the defendants had not discriminated against the plaintiffs on the basis of their handicap. Given the

(Note: Footnote #3 continued next page).

they can demonstrate that confinement in such institutions is detrimental to their individual needs. Thus, if the State Agency officials choose, as they have, to limit the availability of community services, habilitation reviews serve no purpose.

B. The law.

The district court's opinion suggests

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[3] (cont.) unsettled nature of this statutorily created right of action, more extensive analysis would have been helpful. I agree that allegations of arbitrary discrimination among identical classes of handicapped individuals do not support a Section 504 claim. "Solely by reason of handicap," means that the mere possession of a handicap is an impermissible ground on which to decide whether an individual is to receive some benefit. Cf. Southeastern Community College v. Davis, 442 U.S. 397, 405, 99 S.Ct. 2361, 2366, 60 L.Ed.2d 980 (1979). Case law and Section 504's implementing regulations do, however, support a Section 504 claim where a recipient of federal funds discriminates against persons on the basis of the severity of a handicap - including the level of an individual's retardation. See, Plummer v. Branstad, 731 F.2d 574, 578 (8th Cir. 1984)(assuming severity of a handicap is itself a handicap); Garrity v. Gallen, 522 F.Supp. 171, 214-215 (D.N.H. 1981); 45 C.F.R. § 84.4(b)(1)(iv).

that the constitutional rights of the mentally disabled to treatment or habilitation[4] are exceedingly narrow once they are involuntarily committed by the State. I would first like to describe the current status of these rights as delineated by the Supreme Court and this court.

1. The Supreme Court.

As the Second Circuit has noted, the Supreme Court has never directly addressed the question whether the mentally disabled have a constitutional right to training or habilitation. Woe v. Cuomo, 729 F.2d 96, 105 (2d Cir.) cert. denied, 469 U.S. 936, 105 S.Ct. 339, 83 L.Ed.2d 274 (1984). In

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[4] As Judge Becker has noted, "[t]echnically, one refers to 'training' or 'habilitation' of the mentally retarded, and 'treatment' of the mentally ill." Clark v. Cohen, 794 F.2d 79, 92 n.6 (3d Cir.) (Becker, J., concurring), cert. denied, 479 U.S. 962, 107 S.Ct. 459, 93 L.Ed.2d 404 (1986). This is because mental retardation is not an illness. See S. Brakel, J. Parry & B. Weiner, The Mentally Disabled and the Law 332 (1985); Youngberg v. Romeo, 457 U.S. at 309 n.1, 102 S.Ct. at 2454 n.1.

Youngberg, however, the Court held that mentally retarded persons confined by the State do have a constitutionally protected liberty interest under the Fourteenth Amendment's Due Process Clause to reasonably safe conditions, freedom from unreasonable restraint, and such minimally adequate training as may be required by these interests.

The Court's point of departure was the "established principle[]" that "a State is under no constitutional duty to provide substantive services for those within its border." 457 U.S. at 317, 102 S.Ct. at 2459. Yet when the State elects to place the mentally retarded in institutions, thereby making them totally dependent, there is no question that the State has a "duty to provide certain services and care." In dispensing such care and services, the State retains considerable discretion in determining the "nature and

scope of its responsibilities." Id.

Romeo was a severely retarded individual. His attorneys conceded that no amount of training would make it possible for him to be released from the institution where he resided. Thus, they did not argue that mentally retarded persons have some "general constitutional right to training per se, even when no type or amount of training would lead to freedom." Id. at 318, 102 S.Ct. at 2459. Because of Romeo's limitations, the Court concluded that the constitutionally protected liberty interests involved in his case were those of "reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." Id. at 324, 102 S.Ct. at 2462.

In determining whether Romeo's substantive rights protected by the Due Process Clause had been violated, the Court noted the need to weigh his liberty in-

terests against the State's reasons for restraining him. Because of the difficulties that inhere in resolving the appropriateness of a given form of treatment, a federal court must "show deference to the judgment exercised by a qualified professional." Id. at 322, 102 S.Ct. at 2461. Where "'professional judgment in fact [is] exercised,'" "'[i]t is not appropriate for the courts to specify which of several professionally acceptable choices should have been made.'" Id. at 321, 102 S.Ct. at 2461. (citation omitted). In determining whether a State has met its obligation to provide the level of training necessary in light of an individual retarded person's liberty interests, "decisions made by the appropriate professional[5] are entitled to a

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[5] A "'professional' decisionmaker" is one who is competent, whether by education, training or experience, to make the particular decision at issue. Long-term treatment decisions normally should be made

(Note: Footnote #5 continued next page.)

presumption of correctness." Id. at 324, 102 S.Ct. at 2462.

Although it did articulate a standard for assessing the State's interests in the manner of a retarded person's confinement, the Youngberg Court did not develop any similar test for deciding the precise level of training to which such person is constitutionally entitled. Recognizing that "the facts in cases of confinement of mentally retarded patients vary widely," the Court suggested that it was impossible to "define or identify the type of training that may be required in every case." The Court did, however, provide this guidance:

> [one] properly may start with the generalization that there is a right to minimally adequate training. The basic requirement of adequacy, in terms more familiar to courts, may be stated as that training

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5 (cont.) by persons with degrees in medicine or nursing, or with appropriate training in areas such as psychology, physical therapy, or the care and training of the retarded.

> which is reasonable in light of identifiable liberty interests and the circumstances of the case. A federal court, of course, must identify a constitutional predicate for the imposition of any affirmative duty on a State.

Id. at 320 n. 25, 102 S.Ct. at 2460 n. 25. Thus, in determining the precise scope of an individual retarded person's rights, "it is essential to focus on the facts and circumstances of the case before a court." Id.

The Court's emphasis on the facts of a retarded person's condition and the nature of his confinement makes clear that the duties of the State will vary in accordance with the severity or the lack thereof of an individual patient's retardation and with the State's asserted purpose in his confinement. Once the State undertakes the duty to provide training to the mentally retarded, if a patient's training is not suited to his individual case, it cannot be said that the "conditions of [his]

confinement ... comport fully with the purpose of [his] commitment," as is required by the Due Process Clause. Id. at 324, 102 S.Ct. at 2462 (citing Jackson v. Indiana, 406 U.S. 715, 738, 92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972)).[6]

It must follow that in the case of an individual who is less severely retarded than was Romeo, that individual would retain more extensive liberty interests that are subject to the protection of the

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[6] In Jackson, the Supreme Court held that an incompetent pretrial detainee cannot be detained indefinitely, once a competency hearing has been held, unless the State institutes civil commitment proceedings. The Youngberg Court recognized that Jackson was distinguishable in that it was a procedural due process case. Nonetheless, its reference to the essential principle of Jackson - that the nature, duration and conditions of a civilly committed person's confinement must be reasonably related to the purposes of his commitment - confirms that when the purpose of commitment is habilitation, the conditions of confinement must be reasonably geared to the treatment needs of the individual retarded person.

due process clause.[7]

Although the precise parameters of a mentally retarded person's constitutional right to training was not delineated by the Youngberg, Court, three Justices indicated their willingness to recognize the existence of such a right in a case where the issue is squarely presented. Joined by Justices Brennan and O'Connor, Justice

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[7] In this respect, I must disagree with a statement made by the Seventh Circuit which suggests that, under Youngberg, the mentally retarded are never entitled to more than "minimally adequate training as is reasonable in light of their interest in freedom of movement." Phillips v. Thompson, 715 F.2d 365, 368 (7th Cir. 1983). This statement was particularly unfortunate in the context of Phillips because the plaintiff class was composed of "higher functioning" mentally retarded adults. The suggestion that the needs and liberty interests of this class of persons is identical to those of a severely retarded person like Romeo has no support in Youngberg and is antithetical to the law of this circuit, as is made clear below.

Blackmun[8] first agreed with the majority that the question of a general right of civilly committed mentally retarded persons to training was not before the Court. Yet he indicated that an involuntarily committed individual has due process rights to such training or habilitation as is needed to preserve those basic self-care skills he possesses when he is first committed - "for example, the ability to dress himself and care for his personal hygiene." 457 U.S. at 327, 102 S.Ct. at 2464.

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8 Only former Chief Justice Burger would have held "flatly that [Romeo] had[d] no constitutional right to training, or 'habilitation,' per se." 457 U.S. at 329, 102 S.Ct. at 2465 (Burger, C.J., concurring in the judgment). See also, O'Connor v. Donnaldson, 422 U.S. 563, 587-88, 95 S.Ct. 2486, 2500, 45 L.Ed.2d 396 (1975) (Burger, C.J., concurring) (there is no basis for equating the right not to be confined without due process and constitutional right to treatment).

Justice Blackmun concluded that "it would be consistent with the [majority's] reasoning ... to include within the 'minimally adequate training required by the Constitution," such training as is reasonably necessary to prevent a person's pre-existing self-care skills from deteriorating because of his commitment." Id. Based on the majority's reasoning that a civilly committed person is entitled to such training as is necessary to prevent further losses of liberty, he explained that a person capable of showing that his civil commitment resulted in a loss of self-care skills would allege "a loss of liberty quite distinct from - and as serious as - the loss of safety and freedom from unreasonable restraints." Id. As Justice Blackmun explained, "For many mentally retarded people, the difference between the capacity to do things for themselves within an institution and total

dependence on the institution for all of their needs is as much liberty as they ever will know." Id.

Justice Blackmun's views are in accord with those of Judge Becker, who has reminded us that "[l]iberty is more than merely the absence of physical confinement." Clark v. Cohen, 794 F.2d 79, 96 (3d Cir.)(Becker, J., concurring), cert. denied, 479 U.S. 962, 107 S.Ct. 459, 93 L.Ed.2d 404 (1986); see also, Bolling v. Sharpe, 347 U.S. 497, 499-500, 74 S.Ct. 693, 694, 98 L.Ed. 884 (1954) (liberty is not limited to mere freedom from bodily restraint but extends to all conduct which an individual is free to pursue); Meyer v. Nebraska, 262 U.S. 390, 399, 43 S.Ct. 625, 626, 67 L.Ed. 1042 (1923) (right to liberty is right to enjoy those privileges long recognized as essential to the orderly pursuit of happiness).

2. The Eleventh Circuit.

Although Youngberg does not precisely establish the parameters of the rights of the mentally retarded to training, this court has indicated that the mentally ill do possess parallel rights to treatment once they are confined by the State for the purposes of treatment - and that these rights are protected by the Constitution. Since Youngberg, this court has not undertaken to review the continuing viability of these landmark decisions. A careful review of these decisions reveals that they are consistent with Youngberg; they may properly be viewed as representing a logical extension thereof.

In Donaldson v. O'Connor, 493 F.2d 507 (5th Cir. 1974), judgment vacated, 422 U.S. 563, 95 S.Ct. 2486, 45 L.Ed.2d 396 (1975), this court considered "for the first time the far-reaching question whether the Fourteenth Amendment guarantees a right to

treatment to persons involuntarily civilly committed to state mental hospitals." Id. at 509. Although the Supreme Court vacated our judgment in Donaldson because this court had not considered the qualified immunity defense, the Court indicated that our opinion was deprived of any precedential force. See 422 U.S. at 577 n. 12, 95 S.Ct. 2494 n. 12. I discuss it here because it contains a more complete explanation of the source of the right to treatment than does Wyatt v. Aderholt - discussed just below - which contains the identical holding. Wyatt is unquestionably good law in this circuit, as well as the new Fifth Circuit. See, Doe v. Public Health Trust of Dade County, 696 F.2d 901, 903 (11th Cir. 1983) (per curiam); Savidge v. Fincannon, 836 F.2d 898, 908 & n. 51 (5th Cir. 1988). Furthermore, as Judge Wisdom has noted, Wyatt was cited with approval in Justice Blackmun's concurring

opinion in Youngberg. See, Savidge, 836 F.2d at 907 n. 51 (citing Youngberg, 457 U.S. at 325 n. 1, 102 S.Ct. at 2463 n. 1 (Blackmun J., concurring)).

In Donaldson we held that "a person involuntarily civilly committed to a state mental hospital has a constitutional right to receive such individual treatment as will give him a reasonable opportunity to be cured or to improve his mental condition." Id. at 520. In reaching this conclusion, we began with the uncontroversial proposition that "civil commitment entails a 'massive curtailment of liberty' in the constitutional sense." Id. (citation omitted); see also, Doe v. Public Health Trust of Dade County, 696 F.2d at 902. Beyond this, "the conclusion that the due process clause guarantees a right to treatment rest[s] upon a two-part theory." The first part acknowledges that a government abridgment of freedom must be

justified in terms of "some 'permissible governmental goal.'" Donaldson, 493 F.2d at 520. (Citation omitted). This principle requires a court to ask "precisely what government interests justify the massive abridgment of liberty [involved]." As the court noted, state civil commitment statutes are typically concerned with (1) the dangerousness of an individual, (2) the need to treat or care for an individual, (3) or the need to supervise or act as custodian of an individual. Id.

We described the second (and the third) of these purposes as a "'parens patriae' rationale" for confinement and explained that when the need for treatment serves as the State's avowed purpose for involuntary commitment, "the due process clause requires that minimally adequate treatment be in fact provided." Id. at 521. As then District Judge Johnson

explained elsewhere, "To deprive any citizen of his or her liberty upon the altruistic theory that the confinement is for humane therapeutic reasons and then fail to provide adequate treatment violates the very fundamentals of due process." Wyatt v. Stickney, 325 F.Supp. 781, 785 (M.D. Ala. 1971), quoted in Donaldson, 493 F.2d at 521. We thought this much implicit in the Supreme Court's decision in Jackson. "If the 'purpose' of commitment is treatment, and treatment is not provided, then the 'nature' of the commitment bears no 'reasonable relation' to its 'purpose' and the constitutional rule of Jackson is violated." Donaldson, 493 F.2d at 521; see also, Lynch v. Baxley, 744 F.2d 1452, 1460 (11th Cir. 1984) (citing Jackson) (jailing of persons awaiting civil commitment hearings violates substantive and procedural due process rights).

The second theoretical underpinning of

the right to treatment derives from the due process limitations on the State's power to use its civil and criminal processes to detain individuals for substantial periods of time. When these limitations upon power are absent, we held that "there must be a quid pro quo extended by the government to justify confinement." Adequate and effective treatment constitutes such a quid pro quo "because absent treatment, the hospital is transformed 'into a penitentiary where one could be held indefinitely for no convicted offense.'" Wyatt v. Stickney, 325 F.Supp. at 784 (citation omitted), quoted in Donaldson, 493 F.2d at 522 n. 22. Of course, where rehabilitative treatment appears to be impossible, the appropriate quid pro quo is "minimally adequate habilitation and care." 493 F.2d at 522.

In Wyatt v. Aderholt, 503 F.2d 1305 (5th Cir. 1974), we addressed the issue

whether the federal courts have the power to order officials of state institutions housing the mentally ill to provide certain minimal levels of psychiatric care and treatment. Relying on the quid pro quo theory described in Donaldson, we again held that those who are civilly committed for the purposes of treatment have a constitutional right to treatment. Id. at 1313-14.

Our statement in Donaldson that the civilly committed are entitled to "such individual treatment as will give [them] a reasonable opportunity to be cured or to improve [their] condition" requires a reappraisal in light of Youngberg. As Youngberg suggests, in the case of a severely retarded individual such as Romeo, who may have no realistic hope of improvement, talk of a "cure" is

misplaced.[9] Yet in cases where improvement is possible, it cannot be said that Youngberg forecloses the existence of a right to such training that will produce that improvement. In a post-Youngberg case, Judge Becker has articulated the circumstances in which a civilly committed retarded person has the right to such treatment as will "improve his condition."

Judge Becker's paradigmatic patient is one whose skills might have improved had he or she never been committed. Building on what he refers to as Justice Blackmun's "non-deterioration principle," Judge Becker concludes that:

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[9] We implicitly recognized as much in Donaldson and Wyatt for we held that "where rehabilitation is impossible," the civilly committed are entitled to "minimally adequate habilitation and care, beyond the subsistence level custodial care that would be provided in a penitentiary." Donaldson, 493 F.2d at 522, quoted in Wyatt, 503 F.2d at 1314.

> the State should be required to provide such a person with at least such training as would match the improvement that she or he would have experienced if never committed. The reasoning reasoning behind this position is analogous to the reasoning supporting the non-deterioration principle: by committing people and preventing them from developing self-care skills, the state is effectively depriving them of the opportunity to develop and exercise their autonomy. This is a deprivation of their due process right to liberty. ... [Thus,] involuntarily civilly committed persons have a right to treatment sufficient to develop their self-care skills to at least the level at which they would be if the persons had not been institutionalized.

Clark, 794 F.2d at 96 (Becker, J., concurring).

III. **This Case Requires Reversal**.

In this case, the district court held that the only question to be resolved with regard to the substantive due process issue was whether the plaintiffs' conditions of confinement were consistent with "minimum standards" of professional judgment. Because three affidavits filed by the

defendants indicated generally that institutionalization of the mentally retarded is professionally acceptable, the court concluded that the defendants had not abridged the due process rights of the plaintiffs. The court's conclusion rests on a doubly erroneous reading of Youngberg. First, the court failed to consider the existence of any liberty interest that might entitle the plaintiffs to treatment that is more beneficial than that which they receive as residents of institutions. Second, the court so magnified and misapplied Youngberg's professional judgment standard as to write the remainder of that opinion, as well as prior law of this circuit, out of existence.

As explained above, Youngberg suggests that the first question for the court in a case such as this is the identification of a "constitutional predicate for the imposition of [the] affirmative duty that

the plaintiff class seeks to impose" on the State. Stated differently, the court must identify the liberty interests at stake that are alleged to be unconstitutionally abridged. This analysis must necessarily take into account the specific facts concerning these plaintiffs. The plaintiffs have urged the court to recognize three distinct liberty interests: the right not to be unduly confined when there is no purpose advanced by such confinement; the right to free from the long-term effects of institutionalization, such as skill deterioration; and the right to exercise certain associational freedoms consistent with the plaintiffs' capacities.

The linchpin of the major decisions in this field - Youngberg, Donaldson, and Wyatt - is that there must be a rational relationship between the nature and duration of confinement and its purpose. See Jackson v. Indiana, 406 U.S. 715, 738,

92 S.Ct. 1845, 1858, 32 L.Ed.2d 435 (1972). Here, the undeniable purpose of the plaintiffs' confinement is care and habilitation.[10] Under our case law, the defendants are under a duty to provide such care and habilitation once it undertakes to confine the mentally disabled for this purpose. The plaintiffs have argued vigorously that confinement in institutions constitutes an undue restraint on their liberty because, as is suggested by the recommendations of their treatment professionals, their institutionalization is

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[10] The declaration of policy preceding Georgia's statutes regarding care for the mentally retarded, recognizes the capacity of mentally retarded persons to be both "personally and socially productive." The obligations the State assumes on behalf of all mentally retarded persons are designed to help them "achieve a greater measure of independent and fulfillment and more fully enjoy their rights of citizenship." Ga.Code Ann. § 37-4-1.

unnecessary and their habilitation needs would be more properly served in a residential setting.

The district court did not assess the validity of this asserted liberty interest. Relying on Phillips v. Thompson, 715 F.2d 365 (7th Cir. 1983) and Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), it concluded only that there is no substantive right to placement in the State's "community-based alternatives" to institutionalization.[11]

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[11] I have already explained my disagreement with the approach taken by the Seventh Circuit in Phillips. See note 4. A distinct, although related, criticism may be made of Society for Good Will. In the latter case, the Second Circuit suggested that the concept of State-imposed "restraints on liberty" is a limited one. See 737 F.2d at 1247. One commentator has reproached the Second Circuit on this ground, explaining that its narrow view of what constitutes "restraint" of the mentally retarded is not supported by the Supreme Court's opinion in Youngberg:

(Note: Footnote #11 con'd next page).

To hold that the plaintiffs have no substantive right to community placement is to mistake the question before the court. The question here is whether, given (1) the needs of the individual plaintiffs, (2) the

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[11] (cont.)

> In Youngberg, Romeo complained of being physically restrained or "shackled" when the Supreme Court discussed "undue restraint," however, it did not limit its language only to physical restraint. First the Court discussed training that would be sufficient to allow Romeo to function free from bodily restraints. The Court...went on to explain that Romeo enjoyed "constitutionally protected interests in conditions of reasonable care and safety, reasonably nonrestrictive confinement conditions, and such training as may be required by these interests." This analysis clearly contemplates a liberty interest in freedom from more than mere physical restraints.

Note, The Right to Treatment: Society for Good Will to Retarded Children, Inc. v. Cuomo, 80 NW.L.REV. 1355, 1377-78 (1986) (footnotes omitted) (emphasis added by commentator).

nature of the confinement which they face in institutions, and (3) the State's asserted reasons for so confining them, their liberty interest is being unconstitutionally abridged. Whether the plaintiffs were entitled to something "better" than permanent confinement in institutions depends entirely on the answer to these questions. Whether the State was required to place the plaintiffs into its community-based alternatives as the only viable alternative to institutionalization was a question the court could not answer without considering the facts relative to the members of the class. Such consideration was aborted by the grant of summary judgment. Had the district court permitted the plaintiffs to proceed, and had the plaintiffs demonstrated that institutionalization is inconsistent with their individual habilitation needs, the district court would have had facts before

it that would have required the district court to hold that Georgia is obligated to alter the conditions of the plaintiffs' confinement. Whether this would require placement in the State's community-based alternatives depends on facts that needed to be developed at a trial.

The second liberty interest asserted by the plaintiffs is the interest in being free from the effects of prolonged institutionalization - most importantly skill deterioration. Nowhere did the district court consider the validity of this claim, a claim clearly made out in the plaintiffs' amended complaint. After reading the record in this case, I am persuaded that a material question of fact remains as to whether members of the plaintiff class are suffering skill deterioration as a result of their continued institutionalization. If such facts established skill deterioration to the satisfaction of the

fact finder, the district court might well have held in accordance with the views of Justice Blackmun, that the plaintiffs have suffered a loss of liberty distinct from that inherent in their confinement. Instead, the district court viewed the case too simplistically and cut off plaintiffs' claims prematurely.

If the plaintiffs have the "skill" or capacity to live in a community setting, and actually living in such a setting - as opposed to residing permanently in an institution - is the only means through which the plaintiffs can exercise this capacity, the continued confinement in an institution constitutes a distinct loss of the liberty inherent in the free exercise of this capacity. The recommendations of certain of the plaintiffs' treatment teams indicate that they do have this capacity. Were such facts developed at trial, I would be prepared to hold that the state is under

an affirmative duty to place the plaintiffs in the community. As Judge Rubin has written,

> The constitutional right to [training] is a right to a program of [training] that affords the individual a reasonable chance to acquire and maintain those life skills that enable him to cope as effectively as his own capacities permit with the demands of his own person and his environment and to raise the level of his physical, mental and social efficiency.

Gary W. v. State of Louisiana, 437 F.Supp. 1209, 1219 (E.D.La. 1976). It is possible, however, that the habilitation needs of the plaintiff class are - or could be - met in the institutions where they reside. Again, this determination depends on facts - facts which were precluded by a summary judgment.

The third liberty interest asserted to be abridged by the defendants is that which resides in being able to associate with family and friends, rooted in the fundamental tenets of the First Amendment.

I have concluded that there is no support in the record for a claim that the plaintiffs' associational freedoms are being abridged by their continued institutionalization. In addition, I note that Ga.Code Ann. § 37-4-102 grants to "clients" in State institutions the "right to communicate freely and privately with persons outside the facility and to receive visitors inside the facility."

Yet in light of the first two liberty interests described above, it is clear that the district court erred in granting summary judgment before even attempting to consider whether the plaintiffs possess liberty interests beyond those of the most profoundly retarded individual. As it stands, this case instructs state authorities in this circuit that they need only meet the most basic needs of the most profoundly retarded persons when caring for the mentally retarded as a whole,

regardless of the particularized needs of individual retarded persons.

As I have explained, one of the most important principles to be distilled from Youngberg and our earlier decisions is that the treatment to which a civilly committed person is entitled must be properly related to that person's condition. See, e.g., Donaldson, 493 F.2d at 520 (treatment must be individualized); Youngberg, 457 U.S. at 322-23, 102 S.Ct. at 2461-62 (professional judgment standard not satisfied unless judgment actually exercised). For Judge Rubin, this is the quintessential element of the inquiry: "What the constitution requires as the state's due to the individual it confines is a program that is proper for that individual." Gary W., 437 F.Supp. at 1219 (emphasis added). After Youngberg, it is clear that a State must demonstrate fully the presence of a counterbalancing due process interest by

showing that the level of treatment provided to the involuntarily confined is consistent with individualized professional judgment.

It is undisputed that members of the plaintiff class have not been receiving the treatment recommended by those professionals responsible for their care. Yet the district court apparently thought that the State could satisfy the burden of showing that no constitutionally protected interests are being abridged by merely filing three affidavits which express general approval of the institutionalization of the mentally retarded. None of these affidavits is longer than three pages. None refers expressly to any member of the class. None indicates that the affiant is familiar with the case histories of the members of the class. Instead, each contains a broad statement indicating generally that institutionalization of the

mentally retarded is not outside the bounds of generally accepted professional judgment.[12] It is simply absurd to suggest that the professional judgment standard contemplated by the Supreme Court in Youngberg can be satisfied in this manner. See Thomas S. v. Morrow, 601 F.Supp. 1055, 1058 (W.D.N.C. 1984) (court "must look for guidance to the professional judgment and decision of those who examined [plaintiff]"), aff'd as modified, 781 F.2d 367 (4th Cir.), cert. denied sub nom. Kirk v. Thomas S., 476 U.S. 1124, 106 S.Ct. 1992, 90 L.Ed 673 (1986) (emphasis added).

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12 See Record, Vol. III, Tab 53 at Exhibit C ("[The] treatment provided the 575 mentally retarded residents in the Developmental Disability Section at Central State Hospital is within the range of accepted professional judgment of ... professionals who provide treatment, training, care and habilitation to the mentally retarded both within the State of Georgia and the entire United States"); Id. at Exhibit D.

The district court's professional judgment analysis derived from Society for Good Will to Retarded Children v. Cuomo, 737 F.2d 1239 (2d Cir. 1984), which held that the mentally retarded have no constitutional right to placement in the community. The Society for Good Will court held that the professional judgment standard requires only that a decision as to a patient's treatment be consistent with "professionally accepted minimum standards." Id. at 1248. Citing Society for Good Will, the district court held that the defendants' affidavits were sufficient to discharge their burden of proving that the level of care being provided to every member of the class was constitutionally adequate. Apparently, the fact that these affidavits "correspond to the language in [Society for Good Will]" was sufficient for the district court.

In affirming these rulings, the

majority has disregarded Youngberg. The majority has instructed defendants situated similarly to the defendants in this case that they need only find a few experts willing to aver summarily that institutionalization provides a professionally acceptable treatment environment for the mentally retarded to overcome any allegations that such environment is constitutionally inadequate to meet the needs of individual retarded citizens.

Our court has a distinguished tradition of sensitivity to the liberty interests of the mentally disabled and the obligations that the State must meet once it takes such persons into custody. This case will be properly read as a significant departure from that tradition since the majority has not even undertaken to consider whether mentally retarded persons may ever have any constitutionally protected liberty interests that go beyond

those inherent in the most basic needs. Our case law has recognized, and I would again hold, that the mentally retarded who are capable of appreciating more than the most rudimentary liberty are entitled to expect that the State shall not confine them in a manner inconsistent with their individual needs.

COURT OF APPEALS' ORDER DENYIUNG REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 87-8635

S.H., individually and on behalf
of all others similarly situated,

Plaintiffs-Appellants,

Versus

JOE EDWARDS and R. DERRIL GAY,
individually and in their official
capacities,

Defendants-Appellees.

Appeal from the United States District
Court for the Northern District of
Georgia

ON PETITION(S) FOR HEARING
AND SUGGESTION(S) OF REHEARING IN BANC

(Opinion November 28, 1988, 11 Cir., 198_,
___F.2d___). (January 9, 1989).

Before FAY and CLARK, Circuit Judges,
GONZALEZ*, District Judge

* Honorable Jose A. Gonzalez, Jr., U.S. District Judge for the Southern District of Florida, sitting by designation.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing In Banc are DENIED.

ENTERED FOR THE COURT:

/S/
United States Circuit Judge

No. 88-1657

Supreme Court, U.S.
FILED
MAY 25 1989
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1988

S.H. and P.F., et al.,

Petitioners,

v.

JOE EDWARDS, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether the State of Georgia is required, by the Fourteenth Amendment to the United States Constitution, to create and fund alternative residential settings for mentally retarded persons whose habilitation in state facilities is within the scope of professional judgment and practices, solely because a different residential setting is recommended.

II. Whether this Court should review questions of state law which create in Petitioners no liberty interest under the Fourteenth Amendment to the United States Constitution.

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No. 88-1657

In The

Supreme Court of the United States

October Term, 1988

S.H. and P.F., et al.,

Petitioners,

v.

JOE EDWARDS, et al.,

Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondents Joe Edwards and R. Derril Gay respectfully request that this Court deny the Petition for a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit. That opinion is reported at 860 F.2d 1045 (1988).

ADDITIONAL GEORGIA LAWS INVOLVED

Art. III, Sec. IX, Par. I, Ga. Constitution, 1983:

No money shall be drawn from the treasury except by appropriation made by law.

O.C.G.A. § 37-4-2(10):

'Least restrictive alternative,' 'least restrictive environment,' or 'least restrictive appropriate habilitation' means that which is the least restrictive available alternative, environment, or appropriate habilitation, as applicable, within the limits of state funds specifically appropriated therefor.

O.C.G.A. § 37-4-3(b)(5):

(b) In addition to the other powers provided by this chapter, the department shall have the authority:

* * *

(5) To determine the care, treatment, education, habilitation, or other specialized services being given all clients.

STATEMENT OF THE CASE

The named Petitioners, S.H. and P.F., both of whom are mentally retarded, brought this class action in 1981 against two Georgia public officials who then supervised the State's mental retardation system in their individual and official capacities. (The original Defendants have been replaced by James G. Ledbetter and John Gates, in their official capacities only). Petitioners alleged that they had been deprived of administrative hearings in violation of the Due Process and Equal Protection Clause of the Fourteenth Amendment and State law, and that they were entitled to habilitation in the least restrictive alternative

as a substantive right under the Due Process Clause, and under § 504 of the Rehabilitation Act of 1975, 29 U.S.C. § 794, and state law. They sought damages, declaratory and injunctive relief, and attorneys fees.

Petitioners moved for partial summary judgment in favor of their claim for administrative hearings and their state law claim for habilitation in the least restrictive alternative; Respondents moved for summary judgment on all issues. The District Court granted Petitioners the administrative hearings they sought on constitutional grounds, and granted Respondents' motion for summary judgment on Petitioners' claim for habilitation in community residential placements, based upon state law, substantive due process and § 504. Petitioners appealed the trial court's decision that they were not entitled to habilitation in community residential placements under the Due Process Clause and § 504. The Eleventh Circuit upheld the District Court's decision and Petitioners are seeking a writ of certiorari from this Court, alleging a substantive right to community residential placements under the Due Process Clause.

The evidence below showed that Georgia voluntarily began a community residential services program for the mentally retarded in 1972, receiving the first large appropriations in 1978 and 1979. By 1983, 1,312 persons were housed in community residential placements, while approximately 2,300 persons were habilitated in institutions. Exhs. B and C to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment. In fiscal year 1983, the state spent $29 million for community residential and nonresidential support services. During 1978 and 1979, state officials overestimated their ability to expand

the community services program within a one-year period, resulting in an unusual lapse of funds; however, since that time only small, and not unexpected, lapses have occurred. Exhs. B and D to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment.

Contrary to the claim of Petitioners, the District Court did not find that members of the class were "in immediate need" of community residential placements. That court's only finding in this regard was that a 1980 state-supported survey concluded some persons in institutions would be "more appropriately served in community residential placements." App. 13a-16a. Respondents filed affidavits fully supporting their position that habilitation of the members of the class in state institutions did not fall below constitutional standards.

REASONS FOR DENYING THE WRIT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT PLAINTIFFS WERE NOT ENTITLED, UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION, TO ALTERNATIVE RESIDENTIAL PLACEMENTS BECAUSE THE HABILITATION THEY WERE RECEIVING IN STATE FACILITIES FELL WITHIN THE SCOPE OF PROFESSIONAL JUDGMENT OR PRACTICE.

As Petitioners conceded in oral argument before the Eleventh Circuit Court of Appeals, they do not seek literal "discharge" from state care and supervision in this litigation. Instead, they ask this Court and the federal

courts below to order the State of Georgia to create and fund new alternative "community residential placements" for them. This movement from a state institution to a "community" placement is not a discharge from state supervision, but a "transfer"[1] to another state supported and supervised residence, much as was characterized by this Court as merely the closing of a "major state instititution" and the creation and expansive funding of "smaller state institutions." *Pennhurst State School and Hospital v. Halderman,* 465 U.S. 89, 107 (1984). (*Pennhurst II*).

In this litigation, Petitioners assert that they have, under the Due Process Clause of the Fourteenth Amendment, a substantive right to, and a liberty interest in, habilitation in smaller community placements.[2] In granting Respondents' Motion for Summary Judgment, the Eleventh Circuit correctly applied the standard established by this Court in *Youngberg v. Romeo,* 457 U.S. 307 (1982) to test whether these alleged rights have been violated.

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[1] Of the 1,312 persons in state funded community residential placements in 1983, 83% required 24-hour care and supervision. It was estimated that persons subsequently moved to such placements would require a greater intensity of services than those placed prior to 1983. Exhs. B and C to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment.

[2] Respondents have consistently argued that Petitioners' claim of an entitlement to community placements does not rise to a constitutional right. If the Petition for Certiorari is granted, Respondents will present this argument more fully in their brief on the merits.

Federal courts have traditionally applied a loose balancing test to evaluate such claims. However, in *Youngberg*, this Court established a more precise test, expressing an intention for uniformity. This Court concluded that deference should be given to "the judgment exercised by qualified professionals" when evaluating the treatment received by an institutionalized mentally retarded person. *Youngberg v. Romeo, supra* at 321-322. No doubt to insure that the habilitation provided did not fall below the level of minimal adequacy and to provide some assurance to treatment personnel, the Court held that liability could be imposed only when "the [treatment] decision by the professional is such a substantial departure from accepted professional judgment, practice or standards as to demonstrate that the person responsible actually did not base the decision on such judgment, practice or standards." *Id.* at 323. The State is not required to provide optimal or better treatment, but only habilitation which falls within the scope of accepted professional judgment. *Id. See Bell v. Wolfish*, 841 U.S. 520 (1979).

The Eleventh Circuit applied this test from *Youngberg* when it said "[w]e agree with the Circuits which interpret *Youngberg* as requiring states to provide habilitation in accord with prevailing standards of practice" and in concluding that the habilitation provided to Petitioners in Georgia's institutions while awaiting community placements if appropriate, "does not deviate from professionally accepted standards." *S.H. v. Edwards*, 860 F.2d 1045, 1046 (11th Cir. 1988) (App. 3a). Like conclusions have been drawn by other circuit courts in similar cases. *See Lelsz v. Kavanaugh*, 807 F.2d 1243 (5th Cir. 1987); *Doe v.*

Gaughan, 808 F.2d 871 (1st Cir. 1986) (mentally ill plaintiff); *Society for Good Will To Retarded Children v. Cuomo*, 737 F.2d 1239 (2d Cir. 1984); *Phillips v. Thompson*, 715 F.2d 365 (7th Cir. 1983).

It is not true, as Petitioners suggest, that the Eleventh Circuit decision was limited to an academic or generalized consideration of the propriety of habilitation of the class in institutions. Respondents presented evidence that professional judgment was exercised in the habilitation of the class by the establishment, review and up-dating of treatment plans. *See* Exh. A to Defendants' Response to Plaintiffs' Motion for Partial Summary Judgment. They also submitted affidavits[3] in which experts, who were familiar with the State institutions housing members of the Class, testified that: (1) they were, based on personal experience, familiar with the treatment received by the resident at a specific institution, and (2) based upon their

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[3] Petitioners complained that these affidavits were served after the motions for summary judgment were filed, claiming prejudice because discovery was over at that point. Actually, as the record will show, the motions for summary judgment themselves were filed after discovery had been completed; Petitioners were not prejudiced by the delay between the filing of the summary judgment motions and the affidavits Respondents rely on. Further, these affidavits were accepted by the trial court magistrate only after Petitioners had asked permission to present additional evidence and Respondents agreed, if afforded the same opportunity. The magistrate gave each party time to submit additional evidence and to respond. Petitioners complained when the affidavits were submitted, but did not submit conflicting evidence or move for the re-opening of discovery.

personal knowledge, the habilitation provided to the persons residing at those institutions fell within the scope of professionally acceptable judgment. Exhs. B-E to Defendants' Supplemental Brief. Thus, Respondents proved by sworn testimony that the habilitation of the members of the plaintiff class in State facilities met constitutional standards.

Petitioners raised no material question of fact with regard to this pivotal issue. They cited a pamphlet prepared by an unnamed employee of the State Department of Human Resources defending the State community residential services program and claiming that institutional care of the mentally retarded interfered with their normalization. Pet. 18-19, 48-49. Petitioners also showed evidence that a 1981 study completed by the State Department of Human Resources found that certain residents of state institutions could be "more appropriately" served in "alternative residential facilities," and that institutional personnel had recommended institutional residents for participation in the already established State community residential services program. App. 13a-16a, Exh. 18 to Plaintiff's Motion for Partial Summary Judgment. (However, as Respondents showed, these recommendations did *not* indicate that those persons no longer met criteria for institutional commitment under O.C.G.A. § 37-4-40. Exh. A to Defendants' Supplemental Brief.) Finally, medical records concerning Petitioner S.H. indicated that personnel at the institution where she resided[4]

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[4] All parties agreed before the Circuit Court that S.H. was moved to a community placement prior to the filing of the affidavits.

felt that her needs had not been met by the institution and that she had regressed; however, the records also indicate that this condition was a result of S.H.'s failure to cooperate in the program provided. Exhs. 6-11 to Plaintiffs' Motion for Partial Summary Judgment.) There was not one shred of evidence that the habilitation provided to the members of the Petitioners class in State institutions fell below minimum professional standards, but only that some Petitioners could be *better* served in community residential alternatives. There was no evidence, as indicated by a lack of citations in the Petition, to support Petitioners' claim that State institutions failed to meet the needs of hundreds of the plaintiff class, were injurious to them, or that, absent the community residential placements to which they claim an entitlement, class members did not need to be cared for in the institutions where they resided. *See* Pet. 21, 47, 49. The trial court *did not* find, as Petitioners repeatedly argue, that any members of the class were in "immediate need" of community placements. App. 13a-16a.

Respondents disproved a material element of Petitioners' cause of action that the habilitation provided to class members fell below minimally accepted standards. There is no relevant evidence raising a material issue of fact concerning this element. As this Court said in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-251 (1985) " . . . there is no issue for trial until there is sufficient evidence favoring the nonmoving party for a jury to return a verdict for the party. . . . If the evidence is merely colorable . . . or is not significantly probative, summary judgment may be granted." Accordingly, without a genuine issue of fact remaining as to this issue, under Rule 56,

Defendants were entitled to summary judgment. Fed. R. Civ. P. 56(e). *See Celotex Corp. v. Catrett*, 477 U.S. 317 (1986). A party may not oppose a motion for summary judgment with evidence hoped to be discovered at trial. *Micro-Sparc, Inc. v. Weinstock*, 758 F.2d. 790 (1st Cir. 1988).

Moreover, the affidavits submitted by Defendants were not irrelevant, but spoke directly to the state action subject to scrutiny under the *Youngberg* test – the habilitation provided to Petitioners. In arguing that the affidavits are irrelevant, Petitioners have listed numerous "decisions" allegedly made concerning Petitioners, revolving around the recommendation that some class members be housed in community residential placements, and have suggested that the Court give deference to one or more of those decisions. Pet. 35-39. This argument distorts the *Youngberg* test. Under *Youngberg*, deference is given to decisions of the State officials actually delivering the habilitation in question; liability is established *only* where that habilitation falls below professionally accepted judgment or standards.

Petitioners appear to argue that members of their class are constitutionally entitled to community residential placements because treatment personnel have recommended or suggest such placements. This argument again reflects a misunderstanding of this Court's decision in *Youngberg*. Petitioners fail to recognize that state officials are required to meet, at most, only *minimal* constitutional standards. *See Youngberg v. Romeo, supra* at 322; *Bell v. Wolfish*, 441 U.S. 520 (1979). In *Youngberg*, the constitutional acceptability of the mentally retarded plaintiffs' care was judged, not by recommendations for a *better* course of habilitation, but by whether the treatment Mr.

Romeo actually received fell within the scope of professional standards. *Id.* at 321-324. *See Lelsz v. Kavanaugh, supra* at 1251; *Society for Good Will to Retarded Citizens v. Cuomo, supra* at 1249. As the Second Circuit Court of Appeals said in *Society For Good Will To Retarded Citizens v. Cuomo, supra* at 1249, even if every expert presented testified that community residential placements were "better" for the mentally retarded, "the federal courts may only decide whether the treatment or residence setting actually selected was a 'substantial departure' from prevailing standards."

If the Petitioners' interpretations were correct, the constitutional rights of mentally retarded persons would vary from state to state and institution to institution, based upon the favored school of professional thought. The uniform constitutional standards sought by this Court in *Youngberg* would not exist and states would be required to provide whatever treatment professionals recommended.

Finally, the decision of the Eleventh Circuit in this case does not, as the Plaintiffs argue, eviscerate this Court's decisions in *Parham v. J.R.*, 442 U.S. 584 (1979) and *Jackson v. Indiana*, 406 U.S. 715 (1972). To the contrary, the Eleventh Circuit's deference to the opinions of experts concerning the acceptability of the habilitation of Petitioners in state institutions is entirely consistent with this Court's opinion in *Parham*, which itself gave deference to the "independent medical judgment" of state hospital professionals in the admission of mentally ill children to state facilities.[5] Contrary to Petitioners' representation

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[5] *Parham* does not require the Defendants to submit detailed affidavits concerning the habilitation of each of the 1000+ Petitioners in order for summary judgment to be granted.

throughout the Petition, the Eleventh Circuit decision was based on uncontroverted evidence concerning the habilitation provided to the plaintiff class that "Georgia's decision to keep *these plaintiffs* in institutional settings . . . does not deviate from professionally accepted standards." (App. 3a.) *See* Pet. 34-35 and 40-41. This conclusion does not eviscerate *Parham*.

Nor does the Eleventh Circuit's decision "fly in the face" of *Jackson*, where this Court held that an individual may not be indefinitely confined to a mental institution because he is incompetent to stand trial on a criminal charge. In explaining its decision, this Court stated that due process required that "the nature and duration of commitment must bear some reasonable relation to the purpose for which an individual is committed." *Jackson v. Indiana, supra* at 728. Because Petitioners herein do not claim that they are capable of caring for themselves or providing such care through others, but seek instead alternative residential care and supervision from the State, the State's continuing reason for providing for their custodial care and habilitation is clear. *See Donaldson v. O'Connor*, 422 U.S. 563, 576 (1975). Petitioners likewise do not contend that, absent available community placements, they do not meet state criteria for commitment to the facilities in which they currently reside. *See* O.C.G.A. § 37-4-40. Thus, the application of *Jackson* to this case is questionable, for it certainly does not establish a right to change one's place of habilitation. Consequently, this compliance with *Youngberg, Parham, Jackson* and other controlling decisions of this Court militates against the issuance of a writ of certiorari to review the Eleventh Circuit's decision.

II. THIS COURT SHOULD NOT REVIEW QUESTIONS OF STATE LAW WHICH CREATE IN PETITIONERS NO LIBERTY INTEREST UNDER THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Petitioners also argue that the District Court and the Court of Appeals erred by rejecting their claim that Georgia substantive law mandates their deinstitutionalization, and that the "failure of the State to abide by that mandate is redressable under the Due Process Clause of the Fourteenth Amendment to the United States Constitution." Pet. 59.

In making this assertion, Petitioners rely primarily upon those portions of the Habilitation of the Mentally Retarded Act, O.C.G.A. §§ 37-4-1 through §§ 37-4-127 (Habilitation Act) and the Community Services for the Mentally Retarded Act, O.C.G.A. § 37-5-1 through 37-5-10 (Community Services Act) set out in their Petition at 5-8. An examination of those code sections clearly demonstrates, however, that they do not even come close to creating a liberty interest in community placements for the mentally retarded. In the first place, the Habilitation Act is self-limiting in a fashion Petitioners have neglected to mention: the "least restrictive placement" and "least restrictive appropriate habilitation" to which Petitioners claim they are entitled by virtue of O.C.G.A. §§ 37-4-121 and 122(a), Pet. 55, means no more than that "which is the least restrictive *available . . . within the limits of the state funds specifically appropriated therefor.*" O.C.G.A. § 37-4-2(10). (emphasis supplied). Secondly, under O.C.G.A. § 37-4-3(b)(5), Respondents' state agency is

given discretion "to determine the care, treatment, education, habilitation, or other specialized services being given to all clients."

Similar restrictions apply to the Community Services Act. As a matter of Georgia law, provision of these services is limited by the appropriations enacted by the Georgia General Assembly. Art. III, Sec. IX, Par. I, Ga. Const. 1983. This Court has recognized that the failure of state legislatures to fully fund legislation benefitting the mentally retarded is merely "a case of the State itself not fulfilling its legislative promises" – not a matter for the federal courts to remedy. *Pennhurst II, supra* at 108. Again, Respondents' department has discretion to decide which community services are to be provided, and in what quantity. O.C.G.A. § 37-5-3-(1). The broad discretion vested in Respondents has been recognized by the Georgia appellate courts. *Robbins v. Lumpkin*, 187 Ga. App. 489, 370 S.E.2d 635 (1988) (reversing a superior court judgment ordering Respondents' department to provide and fund alternative community placement for mentally retarded persons).

Moreover, the State statutes in question neither set "substantive limitations on official discretion," *Olim v. Wakinekona*, 461 U.S. 238, 249 (1983), nor spell out "objective and defined criteria," *Connecticut Board of Pardons v. Dumschat*, 452 U.S. 458, 466 (1981), for state decisionmakers who must place retarded residents in scarce community resources. Indeed, Petitioners have not, and cannot, point to any "procedural guidelines" or other regulations which "channel the decision-making" regarding the creation of, and access to, community placements.

Hewitt v. Helms, 459 U.S. 460, 471 (1983). As this Court has said, "[i]f the decision-maker is 'not required to base its decisions on objective and defined criteria,' but instead 'can deny the requested relief for any constitutionally permissible reason or for no reason at all,' . . . the State has not created a constitutionally protected liberty interest." *Olim v. Wakinekona, supra, quoting Connecticut Board of Pardons v. Dumschat, supra*, at 466-467 (Brennan, J., concurring); *see also Vitek v. Jones*, 445 U.S. 480, 488-491 (1980).

In arguing that the Eleventh Circuit misinterpreted Georgia's laws on the habilitation of its mentally retarded citizens, Petitioners forget that this Court "d[oes] not grant certiorari to decide whether the Court of Appeals correctly applied [state] law." *Butner v. United States*, 440 U.S. 48, 51 (1979); *see also Pierson v. Ray*, 386 U.S. 547, 558 n.12 (1967). Instead, this Court generally "accord[s] great deference to the interpretation and application of state law by the court of appeals," *Pembauer v. City of Cincinnati*, 475 U.S. 469, 485 n. 13 (1986), because "district courts and courts of appeals are better schooled in and more able to interpret the laws of their respective States." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 500 (1985); *see also Chadron v. Fumero Soto*, 462 U.S. 650, 654 n.5 (1983); *Bishop v. Wood*, 426 U.S. 341, 346, n. 10 (1976).

By their present argument, Petitioners seek to have the federal courts award substantive relief based on particular State laws apparently sought to be incorporated

directly into the Due Process Clause. Petitioners have cited as authority for this novel proposition only federal cases providing procedural protections for rights created by State law. *See, e.g., Mills v. Rogers,* 457 U.S. 291 (1982). In doing so, they have confused the procedural aspect of the Due Process Clause with its substantive aspect. *See Daniels v. Williams,* 474 U.S. 327, 337 (1986) (Stevens, J., concurring); *see also New Motor Vehicle Bd. of California v. Orrin W. Fox Co.,* 439 U.S. 96 (1978); 2 R. Rotunda, J. Nowak, J. Young, *Treatise on Constitutional Law* (1986) at 15, 205 n.14. It bears emphasis again that Petitioners conceded in oral argument before the Eleventh Circuit Court of Appeals that they do not seek literal "discharge" from state care and supervision in this litigation. Consequently, their discussion of, and citations to, procedural due process cases, especially those pertaining to release from state prisons and other facilities, Pet. 59-63, are simply inapposite.

Petitioners' argument that the Georgia statutes in question create rights which are *ipso facto* enforceable through the Fourteenth Amendment fails for at least two reasons. First, the Due Process Clause is designed to serve "as a limitation on the State's power to act. . . ." *DeShaney v. Winnebago County Dept. of Social Services,* ___ U.S.___, ___, 109 S.Ct. 998, 1003 (1989); *see also Daniels, supra,* 474 U.S. at 331. By definition, the Clause cannot serve as a check on a state law if it automatically takes on the shape of that law.

Second, incorporating a particular state law into the Clause would mean that the federal courts in actuality

would be adjudicating a claim that state officials have violated state law. This practice is exactly the one proscribed in *Pennhurst II, supra* at 109, on the ground that a "federal court's grant of relief against state officials on the basis of state law, whether prospective or retroactive, does not vindicate the supreme authority of federal law." *See also Papasan v. Allain*, 478 U.S. 265 (1986). As noted previously, the District Court granted Respondents relief from Petitioners' express state law claim on the authority of *Pennhurst II*, and the Circuit Court correctly did not disturb that ruling. Petitioners may not evade the force of *Pennhurst II* by attempting to dress their substantive state law claim in constitutional garb. The Court of Appeals and the District Court obviously considered Petitioners' bootstrap argument to be without merit. Since the lower courts were neither "clearly erroneous", *United States v. Durham Lumber Co.*, 363 U.S. 522, 527 (1960), nor "unreasonable," *Propper v. Clark*, 337 U.S. 472, 486-487 (1949), their views should be accorded deference by this Court.

CONCLUSION

For the foregoing reasons, the Petition For a Writ of Certiorari to review the decision of the United States Court of Appeals for the Eleventh Circuit should be denied.

Respectfully submitted,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

PETITIONER'S REPLY BRIEF

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Respondents.

PETITIONERS' REPLY BRIEF

I. The lower courts erred in granting and affirming summary judgment to the Respondents in light of the professional judgments of Petitioners' treatment teams that they no longer needed institutionalization, and the evidence that institutionalization was harmful to them.

Petitioners do not assert a "liberty interest in habilitation in smaller commu-

nity placements." Response at 5. Rather, the Petitioners assert a constitutional right to liberty, absent a proper purpose for confinement. By attempting once again to recharacterize the issue in this case as one involving a right to community placement, Respondents have confused the issues of liability and remedy. The threshold question of constitutional liability -- that is, whether the continued, indefinite confinement of the Petitioners violates their liberty interests, in the face of allegations that they are being harmed thereby -- was also never reached by the lower courts because of their misapprehension of the nature of the Petitioners' claim. Summary judgment was granted prematurely, notwithstanding the evidence of ongoing injury to both the named plaintiffs and the class from prolonged institutionalization.

Judge Clark, in his dissent below, correctly understood this constitutional issue, when he observed that the plaintiffs had sufficiently alleged liberty interest violations to permit them to proceed to trial. For instance, he stated, "I am persuaded that a material question of fact remains as to whether members of the plaintiff class are suffering skill deterioration as a result of their continued institutionalization." S.H. v. Edwards, 860 F.2d 1045, 1061 (11th Cir. 1988). The Petitioners were never allowed to establish the injuries suffered by them by virtue of their inappropriate institutionalization, and the question of whether the institutionalization of the individual plaintiffs was justified by professional judgment sufficient to meet the standard of Youngberg v. Romeo, 457 U.S. 307 (1982) was never reached.

Whether discharge to community placements, or some other relief, would have been appropriate to remedy the violations of the Petitioners' liberty interests need not be addressed by this Court. If Petitioners' liberty interests have been violated, an appropriate remedy might - or might not - include an order requiring development of new placements. Had the Petitioners been allowed to proceed to trial and establish not only the infringement of their liberty interests, but also the damage they have suffered thereby, appropriate relief would have followed in accordance with the broad remedial powers of the district court. Cf., Parham v. J.R., 442 U.S. 584, 620 n. 23 (1979) (district court's order requiring state to provide alternative treatment facilities and programs "..more appropriate as a remedy for a substantive due process violation...")

Respondents' only answer was, and still is, that institutionalization of mentally retarded persons is generally consistent with broad professional norms. They suggest that this Court's references to professional judgment in Youngberg were intended only to assure that institutions for the mentally retarded "did not fall below the level of minimal adequacy." Response at 6. In essence, Respondents' view is that Youngberg does little more than extend Eighth Amendment-like protections to the mentally retarded. In granting and affirming summary judgment for Respondents on this issue, the lower courts agreed.

Respondents posit a standard which establishes a constitutional floor: that the institution generally meets professional standards. This minimal level of ade-

quacy, in Respondents' view, becomes the "uniform constitutional standard sought by this Court in Youngberg." Response at 11 (emphasis supplied). The Respondents' approach wholly misunderstands the role played by the professional judgment standard in Youngberg. Professionally adequate institutions are a necessary, but not a sufficient, condition of Petitioners' confinement. For a prisoner, the additional condition justifying his confinement is his arrest and/or conviction. For a mentally retarded individual, the additional condition is a professional opinion that the individual needs the services provided by an institution.

Youngberg confers on the judgment of a qualified, appropriate professional presumptive validity in justifying specific kinds of treatment, including restraints. When the treating professional reaches the

conclusion that a particular type or level of restraint is not warranted, then maintaining that restraint is unconstitutional. Cf., Parham v. J.R., 442 U.S. 584, 615 (1979) (although the determination of adequate continued hospitalization, or release, procedures were remanded to the district court, the Court noted that "...the superintendent of each hospital is charged with an affirmative statutory duty to discharge any child who is no longer mentally ill or in need of therapy.")

Under Youngberg, moreover, a professional opinion might be challenged by countervailing evidence that the judgment rendered is "a substantial departure from accepted professional judgment, practice, or standards", 457 U.S. at 323, signalling that the treatment decision was not actually based on professional judgment. In any case, once the professional opinion which

initially supported institutionalization of the individual changes, the requisite condition justifying confinement is no longer present. Continued confinement then becomes, at best, custodial, (contrary to Georgia law, which provides for institutionalization only when habilitative services needed by the individual can be provided in the institution, O.C.G.A. § 37-4-40(f)(3)), or at worst, affirmatively injurious to the individual. No "professional" opinion can support a form of "treatment" which is actually harmful to an individual, as was alleged here.

The Petitioners should have been allowed to go to trial on the issues regarding the infringement of their liberty interests and their allegations of harm from institutionalization contrary to professional judgment. In acknowledging that treating professionals prescribed discharge

for individual plaintiffs in this case, the Respondents actually underscore the inappropriateness of the entry of summary judgment in this case. Nonetheless, they continue to assert that a wholesale opinion approving a type of service for the mentally retarded in general pretermits any inquiry into liberty interest violations, and concomitant injury, by these Petitioners. This Court should clarify that the Constitution conditions restraint of an individual retarded person on the professional judgment as to that individual, and that Respondents may not simply sweep all mentally retarded persons into an insitution based on an opinion that institutionalization is "within the range" of generally accepted professional practices for the retarded.

The Respondents emphasize the Petitioners' alleged failure to show that they

do not meet the criteria for commitment. Response at 8, 12. The genesis of this lawsuit, however, was the Respondents' refusal to provide the Petitioners with the very means by which to establish that they did not meet those criteria -- periodic reviews of their need for institutionalization. Furthermore, under the Respondents' approach to the issue in this case, such a showing would be irrelevant, as institutionalization would continue to be permissible so long as it was within the broad range of professional standards. Respondents maintain they can continue to confine the Petitioners, whether they meet the commitment criteria or not. Only this Court can restore the Petitioners' hope of liberty.

II. **The lower courts erred in failing to consider whether a liberty interest is created by Georgia law, and if so whether**

it is adequately protected by the procedures provided by the Respondents.

The Respondents argue that Georgia law creates no liberty interest because there are no criteria governing the grant or denial of the "requested relief." This turns the inquiry on its head. The applicable criteria relate to the state's right to continue institutionalization, not to "grant" release. The Respondents' argument ignores the fact that the state must have a constitutionally permissible reason to confine, not a reason to release. The lower courts in this case should have determined whether the Georgia statutes in fact create a liberty interest and then what due process must be available to protect it.

In fact, as a result of this litigation, the Petitioners now get due process, in the form of periodic reviews of their need for continued institutionalization.

Still, that process is fatally flawed, because, at best, the Petitioners get placed on a waiting list for community placement. See, S.H., 860 F.2d at 1050. They get no meaningful relief in the form of an actual community placement once continued institutionalization is no longer necessary. This is true notwithstanding Georgia's assumption, in the Community Services for the Mentally Retarded Act, O.C.G.A. § 37-5 et seq., of the duty to provide community placements to all mentally retarded individuals who can benefit therefrom. On remand, the district court would be asked to evaluate the adequacy of such a procedure.

Finally, and perhaps most startlingly, the Respondents' argument concludes with the statement that it can deny access to community services for no reason at all. Response at 15. Thus the issue is framed

in this case: what are the limits to the state's ability to infringe on the Petitioners' liberty interest? If there is no limit, the Petitioners have shed their individual constitutional rights at the door of the institution. In Vitek v. Jones, 445 U.S. 480, 493 (1980), this Court held that involuntary commitment to a mental hospital was not within the range of conditions of confinement to which a prison sentence subjects an individual. Likewise, indefinite institutionalization is not within the range of conditions of confinement to which commitment to an institution for habilitation subjects a mentally retarded individual. Cf., McNeil v. Director, Patuxent Institution, 407 U.S. 245, 249 (1972) (state cannot for all practical purposes confine one long-term without adequate procedural protections); Jackson v. Indiana, 406 U.S. 715, 729 (1972)

(..."release is appropriate when the individual no longer requires the custodial care or treatment or detention that occasioned the commitment..."). At some point, the individual's right to liberty must prevail -- wherever else that point might lie, it certainly is reached when prolonged institutionalization is injurious to the individual and contrary to the opinions of his treating professionals. This is the right which Petitioners ask this Court to affirm.

Therefore, it is respectfully submitted that the Petition for Certiorari should be granted.

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